United States Court of Appeals for the Second Circuit

JOINT APPENDIX

76-4179

United States Court of Appeals
FOR THE SECOND CIRCUIT

B

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

P/s

ON PETITION FOR REVIEW OF ORDER OF THE FEDERAL TRADE COMMISSION

JOINT APPENDIX

VOLUME I

Pages 1 to 862

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UNITED STATES COURT OF APPEALS
FILED
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DANIEL FUSARO, CLERK
SECOND CIRCUIT

PAGINATION AS IN ORIGINAL COPY

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FEDERAL TRADE COMMISSION

COMPLAINTS

In the matter of: GREAT ATLANTIC & PACIFIC TEA COMPANY, INC., et al

000001

No. [illegible]

	RESPONDENTS	Complaint Served	Answer Filed	Initial Decision Served	Commission Decision Served	Compliance Report Filed	ATTORNEYS
1.	Great Atlantic & Pacific Tea Company, Inc. 420 Lexington Ave., New York, N.Y. 10017	10-15-71	11-15-71		6-1-76		Cahill, Gordon, Sonnett, Reindel & Ohl Eighty Pine Street, New York, N.Y. 10005
2.	Borden, Inc. 350 Madison Avenue, New York, N.Y. 10017 277 Park Avenue, New York, N.Y. 10017	10-18-71	11-16-71	10-9-75			(1) Sidley & Austin One First National Plaza, Chicago, Ill. 60670 (2) Walter W. Kecher 277 Park Ave., New York, N.Y. 10017
	The Attorney General Department of Justice Washington, D.C. 20580	10-15-71					(2)

Act:

F.T.C.
Clayton Act - Section 2(f)

Charge—Commodity—Trade Name:

Restraint of trade -
Prices - Discrimination -

Food products - Dairy -
Food products - Dairy - Milk -

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H.R. Hinkes - 12-6-72

Counsel Supporting Complaint:

J.J. Mathias - (ii)
E.R. Soeffing - 8-24-71
A.C. Stone - 8-25-71
E. Weinbach - 12-18-72 to 3-20-75
E.W. Palewicz - 10-4-73 to

9-24-75 Initial Decision Filed

Final Action:

4-29-76 Final Order -
Adopting after modification administrative law judge's initial decision and order to cease and desist and order to file report of compliance.
Opinion - Commission - Attached

(For voting record, see history column)

(COURT PROCEEDINGS)

HISTORY

Initial hearing set for:
December 1, 1971 at 10:00 a.m.
Washington, D.C.
Federal Trade Commission Offices
1101 Bldg., 414-11th St., N.W.

10-8-71 Complaint issued.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 10-15-71
Sidley & Austin - 10-18-71

10-8-71 Order by Director, Hearing Examiners, appointing hearing examiner E.P. Schrup.
(served with complaint)

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F.T.C. [illegible]

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$\frac{1-2}{8866-1}$	COMM. EXHS.	130	-	199
$\frac{1-3}{8866-1}$	COMM. EXHS.	200	-	305
	RESP. A&P EXHS.	1	-	10
$\frac{1-4.}{8866-1}$	RESP. A&P EXHS.	11	-	67
$\frac{1-5}{8866-1}$	RESP. A&P EXHS.	68	-	134
$\frac{1-6}{8866-1}$	RESP. A&P EXHS.	135	-	148
$\frac{1-7}{8866-1}$	RESP. A&P EXHS.	149	-	172
$\frac{1-8}{8866-1}$	RESP. A&P EXHS.	173	-	178
$\frac{1-9}{8866-1}$	RESP. A&P EXHS.	179	-	189
$\frac{1-10}{8866-1}$	RESP. A&P EXHS.	190	-	232
$\frac{1-11}{8866-1}$	RESP. A&P EXHS.	233	-	241
$\frac{1-12}{8866-1}$	RESP. A&P EXHS.	242		
$\frac{1-13}{8866-1}$	RESP. A&P EXHS.	242		

(Cont'd on sheet 6c)

HISTORY

11-4-71 Application by counsel supporting complaint for the taking of depositions
Mailed:
Cahill, Gordon, Sonnett, Reindel & Ohl
Sidley & Austin

11-9-71 Hearing examiner's order cancelling hearing set for December 1, 1971, subjest to being reset on five days notice to the parties.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 11-12-71
Sidley & Austin - 11-12-71

11-9-71 Hearing examiner's order granting application by counsel supporting complaint for taking of depositions of Ralph R. Minkler, Joseph Malone and Gordon Tarr, commencing at at 10;00 a.m., December 1, 1971, Chicago, Ill., Room 486, United States Courthouse and Federal Building, 219 Dearborn Street.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 11-11-71
Sidley & Austin - 11-1--71

11-15-71 Answer filed by respondent (1).

11-15-71 Application by respondent (1) for issuance of a subpoena duces tecum directed to the Secretary, Federal Trade Commission, for the purpose of producing for inspection and copying certain documents; and request for vacation or modification of order authorizing the taking of depositions; and further request for oral argument on this application.

11-16-71 Answer filed by respondent (2).

11-17-71 Reply by counsel supporting complaint in opposition to motion by respondent (1) for vacation or modification of order authorizing the taking of depositions, and their applicaiton for the issuance of a subpoena duces tecum for the production of documents.
Mailed:
Cahill, Gordon, Sonnett, Reindel & Ohl
Sidley & Austin

11-18-71 Motion by respondent (2) for modification of order granting application for taking of depositions, and request that the depositions be resceduled for an appropriate time not less than sixty days after the previously scheduled date of December 1, 1971.

HISTORY

11-18-71 Reply by counsel supporitng complaint in opposition to motion by respondent (2) for modification of order granting application for taking of depositions.
Mailed:
Cahill, Gordon, Sonnett, Reindel & Ohl
Sidley & Austin
Walter W. Kocher

11-22-71 Hearing examiner's order denying motions by respondents for modification or vacation of order authorizing depositions, etc., and denying application by respondents for the issuance of a discovery subpoena directed to the Secretary of the Commission:
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 11-26-71
Sidley & Austin - 11-26-71
Walter W. Kocher -

11-26-71 Application by respondent (1) for issuance of a subpoena duces tecum requiring respondent (2) to produce certain documents for inspection and copying.

12-7-71 Hearing examiner's order setting prehearing conference for January 12, 1972 at 1 p.m. Washington, D.C., Room 332, Federal Trade Commission Building; and directing that conference will be stenographically reported.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 12-13-71
Sidley & Austin - 12-10-71
Walter W. Kocher - 12-10-71

12-17-71 Hearing examiner's certification of application by counsel supporting complaint to certify to the Commission of the refusal of a deponent witness to testify under a subpoena ad testificandum; with application to certify question to the Commission and copy of CXID 165.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 12-20-71
Sidley & Austin - 12-20-71
Walter W. Kocher - 12-19-71
William N. Braun - 12-20-71

(Cont'd on sheet 2)

HISTORY

1-3-72 **Answer by William N. Braun, Purdilt & Calkins, 135 South La Salle Street, Chicago, Ill. 60603, attorneys for Joseph F. Malone, to the application by counsel supporting complaint for certification to the Commission of the refusal of deponent witness to testify under a subpoena ad testificandum.**

1-6-72 **Order compelling Joseph F. Malone to give testimony and provide such other information as may be specified by the hearing examiner, this order to become effective as provided in Title 18 U.S.C. 6002.**
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 1-10-72
Sidley & Austin - 1-11-71
Walter W. Kocher - 1-10-72
William N. Braun - 1-10-72

1-19-72 Hearing examiner's order setting hearing February 9, 1972, at 10 a.m., Washington, D. C., Room 332, Federal Trade Commission Building, 6th & Pennsylvania Avenue, N. W., to take deposition of Joseph F. Malone.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 1-21-72
Sidley & Austin - 1-24-72
Walter W. Kocher - 1-21-72
Joseph F. Malone - 1-22-72
William N. Braun - 1-24-72

1-18-72 Request by respondent (2) for simplification and clarification of issues with respect to Count III.

1-28-72 Response by counsel supporting complaint to request by respondent (2) for simplification and clarification of issues as to Count III.
Mailed:
Cahill, Gordon, Sonnett, Reindel & Ohl
Sidley & Austin
Walter W. Kocher

HISTORY

2-10-72 Request by respondent (1) for simplification and clarification of the issues.

2-22-72 Reply by counsel supporting complaint to request of respondent (1) for simplification and clarification of issues.
Mailed:
Cahill, Gordon, Sonnett, Reindel & Ohl
Sidley & Austin
Walter W. Kocher

3-8-72 Order by Director, Hearing Examiner's, appointing substitute hearing examiner T. P. von Brand.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 3-13-72
Sidley & Austin - 3-13-72
Walter W. Kocher - 3-13-72

3-28-72 Hearing examiner's order rescheduling prehearing conference from April 3, 1972 to April 13, 1972, at 10 a.m., Washington, D. C., Room 7312, 1101 Building, 11th & Pennsylvania Avenue, N.W.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 3-30-72
Sidley & Austin - 3-31-72
Walter W. Kocher - 3-30-72

4-18-72 Hearing examiner's order scheduling prehearing conference for May 31, 1972, at 1:00 p.m., Washington, D. C. Room 332, Federal Trade Commission Building, 6th & Pennsylvania Avenue, N. W.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 4-19-72
Sidley & Austin - 4-20-72
Walter W. Kocher - 4-19-72

4-19-72 Request by counsel supporting complaint for respondents to simplify and clarify the issues arising as the result of their respective answers.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 4-21-72
Sidley & Austin - 4-24-72
Walter W. Kocher - 4-21-72

HISTORY

4-19-72 Statement by counsel supporting complaint of additional order provisions which are necessary in the public interest.
Mailed:
Cahill, Gordon, Sonnett, Reindel & Ohl
Sidley & Austin
Walter W. Kocher

5-1-72 Response by respondent (1) to request by counsel supporting complaint for clarification of issues by respondents.

5-4-72 Hearing examiner's order setting prehearing conference for May 22, 1972, at 10:00 a.m. Chicago, Ill., in Room 424, Everett McKinley Dirksen Office Building, 219 South Dearborn Street, for the return on certain discovery subpoenas.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 5-5-72
Sidley & Austin - 5-8-72
Walter W. Kocher - 5-5-72

5-5-72 Response of respondent (2) to various questions posed by counsel supporting complaint.

5-8-72 Hearing examiner's order directing that prehearing conference previously scheduled for May 31, 1972 shall be held in Room 7312, 1101 Building, 414 11th Street, N. W., Washington, D. C.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 5-10-72
Sidley & Austin - 5-11-72
Walter W. Kocher - 5-10-72

6-5-72 Hearing examiner's order setting prehearing conference for July 10, 1972, at 1 p.m., Washington, D. C., Courtroom # 1, United States Tax Court, 1111 Constitution Avenue, N. W.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 6-7-72
Sidley & Austin - 6-8-72
Walter W. Kocher - 6-7-72

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HISTORY

6-30-72 Hearing examiner's protective order covering documents turned over to counsel supporting complaint by Model Food Center, Inc., Joe Tittle & Sons Inc., Burgers Supermarket, Inc., Wilco Food Center, Inc., Christopher Foods, Inc., Wallies Market and Jim's Grocery (Wilson Foods), at a prehearing conference on May 23, 1972 in response to subpoenas duces tecum.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 7-5-72
Sidley & Austin - 7-5-72
Walter W. Kocher - 7-5-72
Model Food Center, Inc. - 7-6-72
Joe Tittle & Sons, Inc. - 7-10-72
Purgers Supermarket Inc. - 7-5-72
Wilco Food Center, Inc. - 7-5-72
Christopher Foods, Inc. - ret., [illegible] 8-7-72
Wallies Market - 7-5-72
Jim's Grocery - 7-5-72

6-30-72 Hearing examiner's protective order covering documents turned over to counsel supporting complaint by Dean Foods Company at a prehearing conference on May 23, 1972 in response to subpoena duces tecum.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 7-5-72
Sidley & Austin -7-5-72
Walter W. Kocher - 7-5-72
Dean Foods Company - 7-5-72
Kirkland & Ellis - 7-5-72

6-30-72 Hearing examiner's protective order covering documents turned over to counsel supporting complaint by High-Low Foods, Inc., at a prehearing conference on May 22, 1972 in response to a subpoena duces tecum.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 7-5-72
Sidley & Austin - 7-5-72
Walter W. Kocher - 7-5-72
High-Low Foods, Inc. - 7-5-72

6-30-72 Hearing examiner's protective order covering documents turned over to counsel supporting complaint by Scot Lad Foods, Inc., at a prehearing conference on May 22, 1972 in response to subpoena duces tecum.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 7-5-72
Sidley & Austin - 7-5-72
Walter W. Kocher - 7-5-72
Scot Lad Foods, Inc. - 7-5-72

6-30-72 Hearing examiner's protective order covering documents turned over to counsel supporting complaint by Jewel Companies, Inc., at a prehearing conference on May 22, 1972 in response to a subpoena duces tecum.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 7-5-72
Sidley & Austin - [illegible]
Walter W. Kocher - [illegible]
Jewel Companies, Inc. - 7-5-72

7-14-72 Hearing examiner's order setting prehearing conference for September [illegible], 1972, at 1 p.m., Washington, D. C., Room [illegible], 6th Street, N. W.; and setting initial hearing to begin November [illegible], 1972, at a time and place to be designated later.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 7-18-72
Sidley & Austin - 7-19-72
Walter W. Kocher - 7-19-72

7-28-72 Hearing examiner's order limiting the admission of evidence relating to Count III of the complaint.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 8-[illegible]-72
Sidley & Austin - [illegible]
Walter W. Kocher - 8-1-72

8-7-72 Request by respondent [illegible] for admissions by counsel supporting complaint for truth of certain matters.

8-11-72 Hearing examiner's order granting request of Hillman's, Inc., for extension of time to August 21, 1972 for filing motion to quash or limit subpoena duces tecum issued on July 31, 1972.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 8-16-72
Sidley & Austin - [illegible]
Walter W. Kocher - [illegible]
Aaron, Aaron, [illegible] - 8-16-72

8-14-72 Motion by Hillman's, Inc., by its attorneys, Aaron, Aaron, Schimberg & Hess, One First National Plaza, Chicago, Ill. 60670, for extension of time to August 21, 1972 for filing motion to limit or quash subpoena duces tecum; with certificate of service.

8-17-72 Reply by counsel supporting complaint to request by respondent (2) for admissions.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 8-[illegible]-72
Sidley & Austin - 8-21-72
Walter W. Kocher - 8-[illegible]-72

8-22-72 Hearing examiner's order extending [illegible] September [illegible], 1972, to Hillman's, Inc. to file motion to quash or limit subpoena duces tecum.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 8-[illegible]-72
Sidley & Austin - 8-25-72
Walter W. Kocher - 8-25-72
Aaron, Aaron, Schimberg & Hess - [illegible]

8-22-72 Hearing examiner's protective order covering documents turned over to counsel supporting complaint [illegible] by counsel for respondents.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 8-25-72
Sidley & Austin - 8-25-72
Walter W. Kocher - 8-25-72

9-1-72 Administrative Law Judge's order [illegible] the return date on the [illegible] previously scheduled for September [illegible], and rescheduling the return date for September 14, 1972, at [illegible], Washington, D. C., Room [illegible], 414 - [illegible] Street, N. W.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 9-[illegible]-72
Sidley & Austin - 9-7-72
Walter W. Kocher - 9-[illegible]
Midwest [illegible] - 9-11-72
Pick-N-Save Foods, Inc. - 9-[illegible]-72

9-[illegible]-72 Motion by respondent (1) to dismiss Count [illegible] of the complaint.

9-14-72 Answer by counsel supporting complaint in opposition to motion by respondent (1) to dismiss Count [illegible] of the complaint.
Mailed:
Cahill, Gordon, Sonnett, Reindel & [illegible]
Sidley & Austin [illegible]
Walter W. Kocher [illegible]

(cont'd on sheet 3)

HISTORY

9-15-72 Copy of request by counsel supporting complaint for admissions by respondent (1), with attachments.

9-15-72 Copy of request by counsel supporting complaint for admissions by respondent (2), with attachments.

9-19-72 Request by respondent (1) for permission to file reply to answer by counsel supporting complaint in opposition to motion to dismiss Count 1 of the complaint; with attached reply.

9-19-72 Administrative law judge's order denying motion by respondent (1) to dismiss Count 1 of the complaint.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 9-21-72
Sidley & Austin - 9-22-72
Walter W. Kocher - 9-21-72

9-20-72 Administrative law judge's order granting request by respondent (1) for permission to file reply to answer by counsel supporting complaint opposing motion to dismiss Count 1 of the complaint.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 9-21-72
Sidley & Austin - 9-22-72
Walter W. Kocher - 9-21-72

9-27-72 Request by respondent (1) for permission to appeal administrative law judge's order denying motion to dismiss complaint.

9-28-72 Answer by respondent (1) for admissions, with certificate of service.

9-29-72 Answer by respondent (2) in opposition to request by counsel supporting complaint for admissions.

HISTORY

10-4-72 Response by counsel supporting complaint in opposition to request by respondent (1) for permission to appeal administrative law judge's order denying motion to dismiss Count I of complaint.
Mailed:
Cahill, Gordon, Sonnett, Reindel & Ohl
Sidley & Austin
Walter W. Kocher

10-6-72 Administrative law judge's protective order regarding subpoena duces tecum issued to Meadowmoor Dairy Division of Scot Lad Foods, Inc.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 10-13-72
Sidley & Austin - 10-13-72
Walter W. Kocher - 10-12-72
Scot Lad Foods, Inc. - 10-13-72

10-13-72 Motion by respondent (1) to dismiss complaint, and for related relief.

10-13-72 Affidavits by respondent (1) in support of motion to dismiss complaint and for related relief.

10-16-72 Administrative law judge's order setting October 20, 1972 for counsel supporting complaint to file answer to motion by respondent (1) for dismissal of complaint.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 10-18-72
Sidley & Austin - 10-19-72
Walter W. Kocher - 10-18-72

10-17-72 Motion by counsel supporting complaint requesting administrative law judge's to determine the sufficiency of response by respondent (1) to request for admissions, with attachments.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 10-21-72
Sidley & Austin - [illegible]
Walter W. Kocher - [illegible]

HISTORY

10-20-72 Answer by counsel supporting complaint in opposition to motion by respondent (1) to dismiss complaint and for related relief, with attachments and exhibits.
Mailed:
Cahill, Gordon, Sonnett, Reindel & Ohl
Sidley & Austin
Walter W. Kocher

10-24-72 Request by respondent (1) for permission to file reply to answer by counsel supporting complaint in opposition to motion to dismiss complaint, with reply attached.

10-25-72 Administrative law judge's order granting permission to respondent (1) to file its reply brief dated October 24, 1972.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 10-30-72
Sidley & Austin - 10-30-72
Walter W. Kocher - 10-30-72

10-25-72 Administrative law judge's order denying requests by respondent (1) for certification of application to appeal the order denying motion to dismiss Count I and for cancellation of hearing set for November 20, 1972; and certifying to the Commission, motion by respondent (1) to dismiss complaint, and the question of whether the charges under Count I should have been the subject of a rule-making proceeding.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 10-30-72
Sidley & Austin - 10-30-72
Walter W. Kocher - 10-30-72

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10-25-72 Motion by respondent (1) for leave to brief and argue the issues certified to the Commission by the administrative law judge; and request a stay of hearing set for November 20, 1972 pending a resolution of the questions certified.

10-26-72 Motion by counsel supporting complaint to have respondent (2) [illegible] responsive answers to certain requests for admissions within 10 days after [illegible] of the order.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 11-1-72
Sidley & Austin - [illegible]
Walter W. Kocher - [illegible]

(Continued) column 1, reverse side of sheet.

	HISTORY
10-26-72	Opposition by counsel supporting complaint to motion by respondent (1) for leave to brief and argue issues raised by certifying various matters to the Commission, etc. Mailed: Cahill, Gordon, Sonnett, Reindel & Ohl - Sidley & Austin Walter W.Kocher
10-27-72	Letter dated October 21, 1972 (treated as a motion) by respondent (1) for a return date on subpoenas issued to Jewel Companies, Inc.
10-27-72	Motion by respondent (2) to dismiss Count III of the complaint.
10-27-72	Affidavit of William A. McLain, attorney associated with the firm of Sidley & Austin, attorneys for respondent (2), in support of motion to dismiss complaint as to Count III, with attachments.
10-27-72	Administrative law judge's order setting subpoena return date on subpoenas directed to Jewel Companies, Inc. dated July 31, 1972 and August 8, 1972, on November 8, 1972 at 10 a.m., Washington, D. C., Room 7314, 1101 Building, 414 - 11th Street, N. W. Served: Cahill, Gordon, Sonnett, Reindel & Ohl - 11-2-72 Sidley & Austin - 11-2-72 Walter W. Kocher - 11-2-72 Jewel Companies, Inc. - 11-2-72
10-30-72	Motion by respondent (2) for order compelling complaint counsel to identify and specify certain reports and files.
10-30-72	Administrative law judge's order adjourning, until further notice, the subpoena return directed to Jewel Companies, Inc., which was previously scheduled for November 8, 1972. Served: Cahill, Gordon, Sonnett, Reindel & Ohl - 11-2-72 Sidley & Austin - 11-3-72 Walter W. Kocher - 11-2-72 Jewel Companies, Inc. - 11-3-72
10-30-72	Administrative law judge's order directing the parties to file on or before November 8, 1972 their views as to whether Borden Co., FTC Docket No. 6652 is factually related to the instant proceeding within the meaning of Section 5(c) of the Administrative Procedure Act. Served: Cahill, Gordon, Sonnett, Reindel & Ohl - 11-2-72 Sidley & Austin - 11-3-72 Walter W. Kocher - 11-2-72
11-3-72	Administrative Law Judge Schrup's order certifying to the Commission depositions of certain witnesses taken on December 1, 2, 3, 1971 and February 9, 10, 1972, with attached letter of counsel supporting complaint. Served: Cahill, Gordon, Sonnett, Reindel & Ohl - 11-7-72 Sidley & Austin - 11-7-72 Walter W. Kocher - 11-7-72
11-7-72	Answer by counsel supporting complaint to order directing parties to file views as to whether Bordon Co., FTC Docket No. 6652, is factually related to the instant proceeding within the meaning of Section 5(c) of the Administrative Procedure Act. Mailed: Cahill, Gordon, Sonnett, Reindel & Ohl Sidley & Austin Walter W. Kocher
11-8-72	Statement of respondent (2) in answer to administrative law judge's order directing parties to file views as to whether Bordon Co. FTC Docket No. 6652 is factually related to the instant proceeding within the meaning of Section 5(c) of the Administrative Procedure Act.
11-8-72	Answer by counsel supporting complaint to motion by respondent (2) to dismiss Count III of the complaint. Mailed: Cahill, Gordon, Sonnett, Reindel & Ohl Sidley & Austin Walter W. Kocher
11-9-72	Answer by counsel supporting complaint to motion by respondent (2) for order compelling specifications of certain categories of evidence. Mailed: Cahill, Gordon, Sonnett, Reindel & Ohl Sidley & Austin Walter W. Kocher
11-9-72	Answer by respondent (1) to order directing the parties to file views as to whether the instant case and Borden Co. Docket No. 6652 are factually related cases within the meaning of Section 5(c) of the Administrative Procedure Act.
11-9-72	Administrative law judge's order cancelling the evidentiary hearings scheduled for November 20, 1972. Served: Cahill, Gordon, Sonnett, Reindel & Ohl - 11-15-72 Sidley & Austin - 11-15-72 Walter W. Kocher - 11-15-72
11-13-72	Letter, dated November 10, 1972, transmitting copies of exhibits A and B, which were erroneously omitted from Statement of Borden, Inc., in Response to Order of October 30, 1972 and filed November 8, 1972.
11-17-72	Supplemental response by counsel supporting complaint to order requesting the parties to submit their views as to whether Borden Corporation, Docket 6652 is factually related to the instant proceeding, etc. Mailed: Cahill, Gordon, Sonnett, Reindel & Ohl Sidley & Austin Walter W. Kocher
11-20-72	Reply by respondent (2) to response by counsel supporting complaint to order requesting the parties to submit views as to whether Borden Corporation, Docket 6652, is factually related to the instant proceeding.
11-21-72	Administrative law judge's order withdrawing as judge in this proceeding. Served: Great Atlantic & Pacific Tea Company - [illegible] Borden, Inc. - [illegible]

HISTORY

11-22-72	Order by Director, Administrative Law Judges, appointing substitute Administrative Law Judge E. P. Schrup. Served: Cahill, Gordon, Sonnett, Reindel & Ohl - 11-27-72 Sidley & Austin - 11-27-72 Walter W. Kocher - 11-27-72
12-1-72	Motion by respondent (2) to set aside the appointment of Administrative Law Judge Schrup as administrative law judge in this proceeding.
12-1-72	Administrative law judge's order directing counsel prepare and file a memorandum on or before December 20, 1972 re factual matters and respondent parties are further directed to describe and indicate any pending or proposed discovery matters required of completion before the commencement of the presentation of the case. Served: Cahill, Gordon, Sonnett, Reindel & Ohl - 12-7-72 Sidley & Austin - 12-7-72 Walter W. Kocher - 12-7-72
12-4-72	Administrative law judge's order withdrawing from the matter pursuant to Section 3.42(g) of the Commission's Rules of Practice for Adjudicative Proceedings. Served: Cahill, Gordon, Sonnett, Reidel & Ohl - 12-7-72 Sidley & Austin - 12-7-72 Walter W. Kocher - 12-7-72
12-6-72	Order by Director, Administrative Law Judges, appointing substitute Administrative Law Judge H. R. Hinkes. Served: Cahill, Gordon, Sonnett, Reindel & Ohl - 12-8-72 Sidley & Austin - 12-8-72 Walter W. Kocher - 12-8-72
12-11-72	Administrative law judge's order directing counsel to comply with the order of November 30, 1972 requesting parties to file certain memoranda. Served: Cahill, Gordon, Sonnett, Reindel & Ohl - 12-14-72 Sidley & Austin - 12-14-72 Walter W. Kocher - [illegible]
12-18-72	Administrative law judge's order extending time to [illegible], 1972 to counsel for parties to [illegible] of [illegible] 3 , [illegible] Served: Cahill, Gordon, Sonnett, Reindel & Ohl - [illegible] Sidley & Austin - [illegible] Walter W. Kocher - [illegible]
12-29-72	Response by counsel supporting complaint to orders requiring the filing of memoranda outlining pending matters. Mailed: Cahill, Gordon, Sonnett, Reindel & Ohl Sidley & Austin Walter W. Kocher
12-29-72	Motion by respondent (1) for the issuance of subpoena duces tecum to Charles A. Tobin, Secretary, Federal Trade Commission, requiring him to produce certain documents, in the Commission's records, with appendixes A thru G.
12-29-72	Memorandum by respondent (1) summarizing pending matters, with appendixes A thru G.
1-3-73	Motion by respondent (2) requesting order to limit out-of-area evidence which may be presented by counsel supporting complaint in support of Count III of the complaint, with proposed order.
1-3-73	Memorandum by respondent (2) summarizing pending matters.
1-11-73	Response by counsel supporting complaint in opposition to motion by respondent (1) for the issuance of a subpoena duces tecum to the Federal Trade Commission. Mailed: Cahill, Gordon, Sonnett, Reindel & Ohl Sidley & Austin Walter W. Kocher
1-12-73	Administrative law judge's notice directing that a prehearing conference will be held January [illegible], [illegible], Washington, D. C., Room [illegible], [illegible] Street, N. W. Served: Cahill, Gordon, Sonnett, Reindel & Ohl - [illegible] Sidley & Austin - [illegible] Walter W. Kocher - [illegible]
1-15-73	Motion by respondent [illegible] for leave to file reply memorandum to response of counsel supporting complaint to motion to dismiss.
1-16-73	Request by counsel supporting complaint that motion by respondent [illegible] for leave to file a reply memorandum be denied. Served: Cahill, Gordon, Sonnett, Reindel & Ohl - 1-19-73 Sidley & Austin - [illegible] Walter W. Kocher - [illegible]
1-16-73	Request by respondent [illegible] for permission to file reply to response of counsel supporting complaint in opposition to motion for the issuance of a subpoena duces tecum to the Federal Trade Commission, with reply and appendix A.
1-17-73	Response by counsel supporting complaint in opposition to request of respondent [illegible] for permission to file reply opposing motion for a subpoena duces tecum directed to the Federal Trade Commission. Mailed: Cahill, Gordon, Sonnett, Reindel & Ohl Sidley & Austin Walter W. Kocher
1-19-73	Order denying motion by respondent [illegible] for leave to brief and argue the issues raised by certification order; denying its motion to [illegible], and further denying its motion to dismiss the complaint. (Commissioners [illegible], Dixon, Jones and Dennison voting in the affirmative, and Commissioner MacIntyre abstained) Served: Cahill, Gordon, Sonnett, Reindel & Ohl - [illegible] Sidley & Austin - [illegible] Walter W. Kocher - [illegible]
1-2[illegible]-73	Motion by respondent [illegible] of a subpoena duces tecum [illegible] Titchner, [illegible] Administrator, [illegible] Regional [illegible] respecting Order No. 50.

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(cont'd. on reverse side)

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HISTORY

1-26-73 Motion by respondent (2) for issuance of a subpoena duces tecum directed to Geoffrey H. Moore, Commissioner, Bureau of Labor Statistics.

1-26-73 Motion by respondent (2) for issuance of a subpoena duces tecum directed to Bruce M. Graham, Deputy Administrator, Statistical Reporting Service, Department of Agriculture.

1-26-73 Motion by respondent (1) to limit out-of-area evidence and additions to the witness list submitted by counsel supporting complaint, with attachments.

1-29-73 Opposition by counsel supporting complaint to motion by respondent (2) for issuance of a subpoena duces tecum directed to Geoffrey H. Moore, Commissioner of Labor Statistics, with exhibits I & II.
Mailed:
Cahill, Gordon, Sonnett, Reindel & Ohl
Sidley & Austin
Walter W. Kocher

1-29-73 Response by counsel supporting complaint in opposition to motion by respondent (2) for issuance of subpoena duces tecum directed to H. R. Hitchner, Milk Market Administrator.
Mailed:
Cahill, Gordon, Sonnett, Reindel & Ohl
Sidley & Austin
Walter W. Kocher

1-29-73 Response by counsel supporting complaint in opposition to motion by respondent (2) for issuance of a subpoena duces tecum directed to Bruce M. Graham, Deputy Administrator, Statistical Reporting Service, United States Department of Agriculture.
Mailed:
Cahill, Gordon, Sonnett, Reindel & Ohl
Sidley & Austin
Walter W. Kocher

2-2-73 ✓ Administrative law judge's order on the results of the prehearing conference of January 31, 1973; and setting a further prehearing conference for February 28, 1973, at 11 a.m., Washington, D. C., Room 7314 414 11th Street, N. W., to [illegible] arrangements for the commencement of hearings.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 2-6-73
Sidley & Austin - 2-7-73
Walter W. Kocher - 2-6-73

HISTORY

[illegible] Reply by counsel supporting complaint in opposition to motion by respondents to limit out-of-area evidence and the witness list of counsel supporting complaint.
Mailed:
Cahill, Gordon, Sonnett, Reindel & Ohl
Sidley & Austin
Walter W. Kocher

2-12-73 Motion by respondent (2) for leave to withdraw its motion for order compelling counsel supporting complaint to identify and specify certain reports and files.

2-12-73 Reply by respondent (2) in support of its motions filed January 26, 1973 for issuance of subpoenas duces tecum.

2-12-73 Motion by respondent (2) for issuance of subpoena duces tecum directed to the Secretary of the Federal Trade Commission for production of certain documents, with attachments.

2-13-73 Administrative law judge's order denying motion by respondent (2) to dismiss Court III of the complaint.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 2-15-73
Sidley & Austin - 2-[illegible]-73
Walter W. Kocher - 2-15-73

2-15-73 Administrative law judge's order directing respondent (1) to file on or before March 1, 1973 an amended answer to counsel supporting complaint's request for admissions and further directing that in all other respects the motion by counsel supporting complaint to determine the sufficiency of responses by respondent to admissions is denied.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 2-20-73
Sidley & Austin - 2-20-73
Walter W. Kocher - 2-20-73

HISTORY

2-[illegible]-73 Request by counsel supporting complaint for extension of time to February 27, 1973 to file answer to motion by respondent (2) for subpoena duces tecum directed to Federal Trade Commission.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 2-2[illegible]-73
Sidley & Austin - 2-23-73
Walter W. Kocher - 2-22-73

2-21-73 Administrative law judge's order directing respondent (2) to file an amended answer to request of counsel supporting complaint for admissions of facts.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 2-22-73
Sidley & Austin - 2-23-73
Walter W. Kocher - 2-22-73

2-21-73 Motion by Jewel Companies, Inc., by its attorneys McDermott, Will & Emery, 111 West Monroe Street, Chicago, Ill. [illegible] to quash subpoena duces tecum served by respondent (1), with certificate of service and exhibits A thru K.

2-22-73 Supplemental reply by respondent (2) in support of its motions for subpoenas duces tecum.

2-22-73 Administrative law judge's order extending time to February 27, 1973 to counsel supporting complaint for filing answer to motion by respondent (2) for a subpoena directed to the Commission.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 2-26-73
Sidley & Austin - 2-26-73
Walter W. Kocher - 2-26-73

[illegible]-73 Administrative law judge's order granting motion by respondent (2) for issuance of subpoena duces tecum directed to Bruce M. Graham, Deputy Administrator, Statistical Reporting Service, Department of Agriculture.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 3-1-73
Sidley & Austin - 3-1-73
Walter W. Kocher - 3-1-73

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HISTORY

2-27-73 Administrative law judge's order granting the motion by respondent (1) to limit witness list and "out of area" evidence of counsel supporting complaint; and directing counsel supporting complaint to specify, in respect to items of the "out of area" evidence, which documents they intend to use as referring to other cities or markets on or before March 5, 1973.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 3-1-73
Sidley & Austin - 3-2-73
Walter W. Kocher - 3-1-73

2-28-73 Administrative law judge's order postponing prehearing conference from February 28, 1973 to March 21, 1973, at 11 a.m., Washington, D. C., Room 7312, 414-11th Street, N. W.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 3-1-73
Sidley & Austin - 3-2-73
Walter W. Kocher - 3-1-73

2-28-73 Administrative law judge's order granting motion by respondent (2) for issuance of subpoena duces tecum directed to H. R. Hitchner, Market Administrator, Chicago Regional Federal Milk Marketing Order No. 30, Department of Agriculture.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 3-1-73
Sidley & Austin - 3-2-73
Walter W. Kocher - 3-1-73

2-28-73 Administrative law judge's order granting motion by respondent (2) for issuance of subpoena duces tecum directed to Geoffrey H. Moore, Commissioner, Bureau of Labor Statistics.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 3-1-73
Sidley & Austin - 3-2-73
Walter W. Kocher - 3-1-73

HISTORY

3-1-73 Administrative law judge's order extending time to March 7, 1973 to counsel supporting complaint for filing answer to motion by respondent (1) for a subpoena directed to the Federal Trade Commission.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 3-5-73
Sidley & Austin - 3-5-73
Walter W. Kocher - 3-5-73

3-1-73 Motion by respondent (1) for extension of time to March [illegible], 1973 within which to answer a portion of request by counsel supporting complaint for admissions.

3-5-73 Amended answer by respondent (1) to request by counsel supporting complaint for admissions, with affidavit.

3-5-73 Response by respondent (2) to motion of Jewel Companies, Inc., to quash subpoena duces tecum.

3-5-73 Motion by respondent (1) for extension of time to March 15, 1973 for filing an amended answer to request by counsel supporting complaint for admissions.

3-5-73 Response by counsel supporting complaint to administrative law judge's order requiring specification of certain documents referring to other cities or markets.
Mailed:
Cahill, Gordon, Sonnett, Reindel & Ohl
Sidley & Austin
Walter W. Kocher

3-6-73 Administrative law judge's order extending time to March 15, 1973 to respondent (1) for filing answer to request by counsel supporting complaint for admissions.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 3-7-73
Sidley & Austin - [illegible]
Walter W. Kocher - [illegible]

HISTORY

3-6-73 Administrative law judge's order directing that the return date of the subpoena directed to Dean Foods Co., be extended to March 19, 1973.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 3-7-73
Sidley & Austin - [illegible]
Walter W. Kocher - 3-7-73
Dean Foods Co. - 3-12-73

3-7-73 Opposition and comments by counsel supporting complaint concerning request by respondent (1) for subpoena duces tecum directed to the Secretary of the Commission.
Mailed:
Cahill, Gordon, Sonnett, Reindel & Ohl
Sidley & Austin
Walter W. Kocher

3-8-73 Response by respondent (1) to motion by Jewel Companies, Inc. to quash subpoena duces tecum, with appendices A - E.

3-12-73 Reply by Jewel Companies, Inc. to the responses of respondents to motion to quash subpoenas duces tecum, with attachments.

3-13-73 Motion by counsel supporting complaint for an order to formally correct the deposition transcript of Joseph P. Mal[illegible], with [illegible] corrections.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - [illegible]
Sidley & Austin - [illegible]
Walter W. Kocher - [illegible]

3-14-73 Further amended answer by respondent (1) to request by counsel supporting complaint for admissions, with affidavit and Appendix A.

3-15-73 Motion by respondent (1) for issuance of subpoena duces tecum directed to the Secretary of Federal Trade Commission, with [illegible].

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HISTORY

2-27-73 Administrative law judge's order denying motion by respondents to limit witness list and "cut of area" evidence of counsel supporting complaint; and directing counsel supporting complaint to specify, in respect to item 9 of the "cut of area" evidence, which documents they intend to use as referring to other cities or markets on or before March 5, 1973.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 3-1-73
Sidley & Austin - 3-2-73
Walter W. Kocher - 3-1-73

2-28-73 Administrative law judge's order postponing prehearing conference from February 28, 1973 to March 21, 1973, at 11 a.m., Washington, D. C., Room 7312, 414-11th Street, N. W.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 3-1-73
Sidley & Austin - 3-2-73
Walter W. Kocher - 3-1-73

2-28-73 Administrative law judge's order granting motion by respondent (2) for issuance of subpoena duces tecum directed to H. R. Hitchner, Market Administrator, Chicago Regional Federal Milk Marketing Order No. 30, Department of Agriculture.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 3-1-73
Sidley & Austin - 3-2-73
Walter W. Kocher - 3-1-73

2-28-73 Administrative law judge's order granting motion by respondent (2) for issuance of subpoena duces tecum directed to Geoffrey H. Moore, Commissioner, Bureau of Labor Statistics.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 3-1-73
Sidley & Austin - 3-2-73
Walter W. Kocher - 3-1-73

HISTORY

3-1-73 Administrative law judge's order extending time to March 7, 1973 to counsel supporting complaint for filing answer to motion by respondent (1) for a subpoena directed to the Federal Trade Commission.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 3-5-73
Sidley & Austin - 3-[illegible]-73
Walter W. Kocher - 3-5-73

3-1-73 Motion by respondent (1) for extension of time to March 1[illegible], 1973 within which to answer a portion of request by counsel supporting complaint for admissions.

3-5-73 Amended answer by respondent (1) to request by counsel supporting complaint for admissions, with affidavit.

3-5-73 Response by respondent (2) to motion of Jewel Companies, Inc., to quash subpoena duces tecum.

3-5-73 Motion by respondent (2) for extension of time to March 15, 1973 for filing an amended answer to request by counsel supporting complaint for admissions.

3-5-73 Response by counsel supporting complaint to administrative law judge's order requiring specification of certain documents referring to other cities or markets.
Mailed:
Cahill, Gordon, Sonnett, Reindel & Ohl
Sidley & Austin
Walter W. Kocher

3-6-73 Administrative law judge's order extending time to March 14, 1973 to respondent (1) for filing answer to request by counsel supporting complaint for admissions.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 3-8-73
Sidley & Austin - 3-9-73
Walter W. Kocher - 3-8-73

HISTORY

3-6-73 Administrative law judge's order directing that the return date of the subpoena directed to Dean Foods Co. is extended to March 15, 1973.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 3-9-73
Sidley & Austin - 3-12-73
Walter W. Kocher - 3-9-73
Dean Foods Co. - 3-12-73

3-7-73 Opposition and comments by counsel supporting complaint concerning request by respondent (1) for a subpoena duces tecum directed to the Secretary of the Commission.
Mailed:
Cahill, Gordon, Sonnett, Reindel & Ohl
Sidley & Austin
Walter W. Kocher

3-8-73 Response by respondent (1) to motion by Jewel Companies, Inc., to quash subpoena duces tecum, with appendices A - E.

3-12-73 Reply by Jewel Companies, Inc. to the responses of respondents to motion to quash subpoenas duces tecum, with attachments.

3-13-73 Motion by counsel supporting complaint for an order to formally correct the deposition transcript of Joseph F. Malone, with list of corrections.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 3-14-73
Sidley & Austin - 3-1[illegible]-73
Walter W. Kocher - 3-1[illegible]-73

3-14-73 Further amended answer by respondent (1) to request by counsel supporting complaint for admissions, with affidavit and appendix A.

3-15-73 Motion by respondent (2) for issuance of a second subpoena duces tecum directed to the Secretary of Federal Trade Commission, with exhibit A.

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HISTORY

3-16-73	Administrative law judge's order extending time to March 26, 1973 to H. R. Hitchner, Market Administrator, to file motion to quash or limit subpoena duces tecum. Served: Cahill, Gordon, Sonnett, Reindel & Ohl - 3-19-73 Sidley & Austin - 3-19-73 Walter W. Kocher - 3-19-73
3-19-73	Motion by Peter J. Brennan, Secretary of Labor, Department of Labor, to quash Subpoena duces tecum issued by respondent (2), with certificate of service.
3-19-73	Affidavit of Ben Burdetsky, Deputy Commissioner, Bureau of Labor Statistics, Department of Labor, in response to subpoena duces tecum issued by respondent (2).
3-19-73	Claim of privilege confidentiality by Alfred G. Albert, Acting Solicitor of Labor, Bureau of Labor Statistics, Department of Labor regarding information requested by respondent (2).
3-19-73	Additional response by respondent (2) to request by counsel supporting complaint for admissions, with affidavit attached.
3-19-73	Response by counsel supporting complaint in opposition to motion by respondent (2) for issuance of second subpoena duces tecum to Federal Trade Commission. Mailed: Cahill, Gordon, Sonnett, Reindel & Ohl Sidley & Austin Walter W. Kocher
3-20-73	Motion by H. R. Hitchner, Market Administrator, Chicago Regional Federal Milk Marketing Order No. 30, to quash subpoena duces tecum issued by respondent (2).
3-21-73	Memorandum in support of motion by Secretary of Labor to quash subpoena duces tecum issued by respondent (2), with certificate of service and attachment.

HISTORY

3-21-73	Addendum to motion by H. R. Hitchner, Market Administrator, Chicago Regional Federal Milk No. 30, to quash subpoena duces tecum.
3-22-73 ✓	Administrative law judge's order on results of prehearing conference of March 21, 1973; and setting tentative hearings to begin June 11, 1973, in Washington, D. C., to continue for three weeks, recessing for the week of July 2, 1973; hearings will resume the week of July 9, 1973, in Washington, D. C., July 16, 1973 and July 23, 1973, in Chicago, Ill., August 6, 1973, in Washington, D. C. for conclusion of case-in-chief by counsel supporting complaint; and directing that the timetable and scheduling of case-in-chief of respondents will be set at a later date. Served: Cahill, Gordon, Sonnett, Reindel & Ohl - 3-26-73 Sidley & Austin - 3-27-73 Walter W. Kocher - 3-26-73
4-4-73	Comments by counsel supporting complaint regarding the subpoena duces tecum issued to Jewel Companies, Inc., at the request of respondents. Mailed: Cahill, Gordon, Sonnett, Reindel & Ohl Sidley & Austin Walter W. Kocher
4-5-73	Reply by respondent (2) to motion to quash subpoena duces tecum directed to the Bureau of Labor Statistics.
4-5-73	Reply by respondent (2) to motion to quash subpoena duces tecum directed to H. R. Hitchner, Market Administrator, Chicago Regional Federal Milk Order No. 30
4-9-73	Response by respondent (2) in support of its first motion for a subpoena directed to the Federal Trade Commission.
4-9-73	Additional response by respondent (2) to motion by Jewel Companies, Inc., to quash subpoena duces tecum.

4-9-73	Motion by respondent (2) for reconsideration of the denial of motion to dismiss Count III, or, in the alternative for certification of that denial to the Commission, with exhibits A and B.
4-11-73	Administrative law judge's order correcting deposition transcript of Joseph F. Malone, with list of corrections. Served: Cahill, Gordon, Sonnett, Reindel & Ohl - 4-13-73 Sidley & Austin - 4-16-73 Walter W. Kocher - 4-13-73 Al[illegible] - [illegible]
4-13-73	Comments by counsel supporting complaint regarding subpoena duces tecum issued to the Market Administrator at the request of respondent (2). Mailed: Cahill, Gordon, Sonnett, Reindel & Ohl Sidley & Austin Walter W. Kocher
4-13-73	Comments by counsel supporting complaint concerning opposition by respondent (2) to motion to quash subpoena directed to the Bureau of Labor Statistics. Mailed: Cahill, Gordon, Sonnett, Reindel & Ohl Sidley & Austin Walter W. Kocher
4-13-73	Response by respondent (1) to comments by counsel supporting complaint regarding subpoena duces tecum issued to Jewel Companies, Inc., with appendix A.
4-13-73	Response by counsel supporting complaint to motion by respondent (2) for reconsideration of order denying its motion to dismiss Count III, or, in the alternative for certification of said motion to the Commission. Mailed: Cahill, Gordon, Sonnett, Reindel & Ohl Sidley & Austin Walter W. Kocher
4-13-73	Response by counsel supporting complaint in opposition to memorandum by respondent (2) in support of its motion for [illegible] subpoena duces tecum to the Federal Trade Commission. Mailed: Cahill, Gordon, Sonnett, Reindel & Ohl Sidley & Austin Walter W. Kocher

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HISTORY

4-13-73 Comments by counsel supporting complaint on motion by respondent (2) for issuance of first subpoena directed to the Secretary, Federal Trade Commission.
Mailed:
Cahill, Gordon, Sonnett, Reindel & Ohl
Sidley & Austin
Walter W. Kocher

4-17-73 Administrative law judge's order ruling on motion by respondent (2) for a subpoena directed to the Federal Trade Commission.
Served:
Cahill, Gordoh, Sonnett, Reindel & Ohl - 4-19-73
Sidley & Austin - 4-20-73
Walter W. Kocher - 4-19-73

4-18-73 Administrative law judge's order ruling on motion by respondent (1) for the issuance of a subpoena duces tecum to the Federal Trade Commission.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 4-23-73
Sidley & Austin - 4-23-73
Walter W. Kocher - 4-23-73

4-18-73 Administrative law judge's order denying motion by respondent (2) for a second subpoena duces teucm directed to the Secretary of the Federal Trade Commission.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 4-23-73
Sidley & Austin - 4-23-73
Walter W. Kocher - 4-23-73

4-24-73 Administrative law judge's order denying motion by Jewel Companies Inc. to quash subpoena duces tecum dated February 6, 1973 issued by respondents.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 4-27-73
Sidley & Austin - 4-26-73
Walter W. Kocher - 4-26-73
McDermott, Will & Emery - 4-27-73

4-25-73 Response by Market Administrator, H. R. Hitchner, to reply of respondent (2) to motion to quash subpoena.

HISTORY

4-25-73 Administrative law judge's order denying motion by respondent (2) for reconsideration or certification of order denying its motion to dismiss Count III of complaint.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl 4-27-73
Sidley & Austin - 4-30-73
Walter W. Kocher - 4-27-73

5-8-73 Administrative law judge's order scheduling hearings to begin as follows:
June 11, 1973, at 10 a.m., Washington, D. C., Room 7312, 414 - 11th Street, N. W.; July 9, 1973, at 10 a.m., Washington, D. C., Room 7312, 414 - 11th Street, N. W.; July 16, 1973 at the Chicago Regional Office, Room 1437 - 55 E., Monroe Street, Chicago, Ill.; and the case-in-chief will be continued during a final week of hearings in Washington, D. C. scheduled for August 6, 1973.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl- 5-10-73
Sidley & Austin - 5-11-73
Walter W. Kocher - 5-11-73

5-14-73 Motion by respondent (2) for cancellation of hearing set for June 11, 1973.

5-16-73 Opposition by counsel supporting complaint to motion by respondent (2) for cancellation of hearing date.
Mailed:
Cahill, Gordon, Sonnett, Reindel & Ohl
Sidley & Austin
Walter W. Kocher

5-17-73 Administrative law judge's order denying motion by respondent (2) for cancellation of hearing date.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 5-21-73
Sidley & Austin - 5-21-73
Walter W. Kocher - 5-21-73

5-18-73 Administrative law judge's protective order regarding documents produced by Jewel Companies, Inc., in response to subpoena duces tecum.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 5-21-73
Sidley & Austin - 5-21-73
Walter W. Kocher - 5-21-73
McDermott, Will & Emery - 5-21-73

HISTORY

5-18-73 Administrative law judge's order denying motion by respondent (1) for issuance of a subpoena duces tecum seeking interview reports.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 5-21-73
Sidley & Austin - 5-21-73
Walter W. Kocher - 5-21-73

5-18-73 Administrative law judge's order denying motion by respondent (2) for the issuance of a subpoena duces tecum for the production of interview reports and applicant letters.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 5-23-73
Sidley & Austin - 5-23-73
Walter W. Kocher - 5-23-73

5-21-73 Motion by counsel supporting complaint for the administrative law judge to take official notice, with attachment.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 5-23-73
Sidley & Austin - 5-24-73
Walter W. Kocher - 5-23-73

5-24-73 Administrative law judge's order quashing subpoena duces tecum served upon the Bureau of Labor Statistics, United States Department of Labor.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 5-30-73
Sidley & Austin - 5-31-73
Walter W. Kocher - 5-30-73
Geoffrey H. Moore - 6-1-73

5-30-73 Administrative law judge's order denying motion by respondent (1) for issuance of subpoena duces tecum for certain Commission's data.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 5-31-73
Sidley & Austin - 6-1-73
Walter W. Kocher - 5-31-73

6-4-73 Request by respondent (1) for additional time to respond to motion by counsel supporting complaint to take official notice.

6-4-73 Response by respondent (1) to motion by counsel supporting complaint to take official notice.

6-14-73 Response by respondent (2) to motion by counsel supporting complaint for official notice.

6-27-73 Order and opinion placing the administrative law judge's subpoena duces tecum directed to the secretary of the Commission on the Commission's docket for review; quashing said subpoena in part; and returning said subpoena to the administrative law judge for further action consistent with this opinion and order.
(Commissioners Engman, Dixon and Jones voted in the affirmative, Commissioner Dennison was recorded as not participating by reason of absence; and Commissioner MacIntyre did not participate.)
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 7-2-73
Sidley & Austin - 7-2-73
Walter W. Kocher -

7-10-73 Amendment to answer by respondent (1) to request by counsel supporting complaint for admissions, with affidavit

8-3-73 Administrative law judge's notice of hearing scheduled for August 13, 1973, at 10 a.m., Washington, D. C., Room 332, 6th & Pennsylvania Avenue, N. W.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 8-8-73
Sidley & Austin - 8-8-73
Walter W. Kocher - 8-8-73

8-31-73 Administrative law judge's order setting September 10, 1973 as time for A & P to submit to complaint counsel and the administrative law judge a proposed date for commencement of case-in-chief, with estimate of time of such hearing and proposed location and directing Borden to file a similar submission within five days following receipt of submission of counsel for respondent A & P; and further directing complaint counsel to respond to proposals of counsel for respondents within five days after receipt of Borden's proposals.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 9-4-73
Sidley & Austin - 9-4-73
Walter W. Kocher - 9-4-73

9-7-73 Administrative law judge's notice directing that hearings will be resumed on October [illegible], 1973, at a time and place to be set.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 9-13-73
Sidley & Austin - 9-13-73
Walter W. Kocher - 9-14-73

9-24-73 Proposed trial schedule for the presentation of its case-in-chief submitted by respondent (1).

9-28-73 Proposed schedule submitted by respondent (2).

10-3-73 Response by counsel supporting complaint in opposition to proposed trial schedules by respondents.
Mailed:
Cahill, Gordon, Sonnett, Reindel & Ohl
Sidley & Austin
Walter W. Kocher

10-4-73 Administrative law judge's order setting prehearing conference for October 16, 1973 at 10:00 a.m., Washington, D. C., Room 7312, 1101 Building, 414 Eleventh Street, N. W.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 10-10-73
Sidley & Austin - 10-11-73
Walter W. Kocher - 10-10-73

10-4-73 Administrative law judge's order setting hearing to begin October 23, 1973, at 10:30 a.m., Washington, D. C., Room 7134, Postal Service Building, 12th & Pennsylvania Avenue, N. W.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 10-11-73
Sidley & Austin - 10-[illegible]
Walter W. Kocher - 10-[illegible]

(Cont'd. on Sheet 6b)

HEARINGS:

Washington, D. C. -	June 14, 1973	414-[illegible]
	June 15, 1973	[illegible]
	June 18, 1973	[illegible]
	June 19, 1973	[illegible]
	June 20, 1973	[illegible]
	June 21, 1973	[illegible]
	June 22, 1973	[illegible]
	June 25, 1973	[illegible]
	June 26, 1973	[illegible]
	June 27, 1973	[illegible]
	June 28, 1973	[illegible]
	June 29, 1973	[illegible]
	July 9, 1973	[illegible]
	July 10, 1973	[illegible]
	July 11, 1973	[illegible]
	July 12, 1973	[illegible]
	July 13, 1973	[illegible]
	July 16, 1973	[illegible]
	July 17, 1973	[illegible]
	July 18, 1973	[illegible]
	July 19, 1973	[illegible]
	July 20, 1973	[illegible]
	July 23, 1973	[illegible]
	July 24, 1973	[illegible]
	July 25, 1973	[illegible]
	July 26, 1973	[illegible]
	July 27, 1973	[illegible]
	July 30, 1973	[illegible]
	July 31, 1973	[illegible]
	Aug. 13, 1973	[illegible]
	August 14, 1973	[illegible]
	August 15, 1973	[illegible]
	August 16, 1973	[illegible]
	August 17, 1973	[illegible]
	October 16, 1973	4643 4740
	October 23, 1973	[illegible]
	October 24, 1973	[illegible]
	October 25, 1973	[illegible]
	October 26, 1973	[illegible]
	October 29, 1973	[illegible]
	October 30, 1973	[illegible]
	October 31, 1973	[illegible]
	Nov. 1, 1973	[illegible]
	Nov. 2, 1973	[illegible]
	January 30, 1974	1-[illegible]
	March 11, 1974	5603-[illegible]
	March 12, 1974	[illegible]
	March 13, 1974	5896-5971
	March 14, 1974	[illegible]
	March 15, 1974	6116-[illegible]
	March 18, 1974	[illegible]
	March 20, 1974	[illegible]
	March 21, 1974	[illegible] -6511
	March 26, 1974	6764-6835
	March 27, 1974	6836-[illegible]
	March 28, 1974	[illegible]-7030
	March 29, 1974	7031-[illegible]
	April [illegible], 1974	[illegible]
	April 15, 1974	[illegible]
	April 16, 1974	[illegible]
	April 18, 1974	[illegible]
	April 22, 1974	7351-7460
	April 23, 1974	7461-[illegible]
	April 24, 1974	[illegible]
	April 25, 1974	7583-[illegible]
	April 26, 1974	[illegible]
	April 29, 1974	[illegible]
	April 30, 1974	[illegible]
	May 1, 1974	7951-8305

(cont'd. on sheet 6b, 3rd column)

	HISTORY
11-19-73	Administrative law judge's order denying access by respondent to the Jewel Companies, Inc. feasibility study. Served: Cahill, Gordon, Sonnett, Reindel & Ohl - 11-21-73 Sidley & Austin - 11-21-73 Walter W. Kocher - 11-21-73
11-27-73	Administrative law judge's order taking official notice of court judgement. Served: Cahill, Gordon, Sonnett, Reindel & Ohl - 11-29-73 Sidley & Austin - 11-30-73 Walter W. Kocher - 11-29-73
11-29-73	Motion by respondent (2) to strike portions of the testimony of Marvin Hoffen and Arnold Holin, with affidavit.
11-29-73	Motion by respondent (2) to strike the testimony of John Kuhlman.
11-29-73	Motion by respondent (2) to dismiss Count III of the Complaint or for a stay based on the Commission's failure to comply with its procedural rules, with exhibits A. thru E.
12-3-73	Motion by respondent (2) to dismiss Count III of complaint for failure of proof; and request for oral argument on this motion.
12-3-73	Motion by respondent (2) to strike certain exhibits.
12-4-73	Memorandum and motion by respondent (1) to dismiss Count III of the complaint, with appendix A.

	[illegible]
12-4-73	Memorandum and motion by respondent (1) to strike exhibits and testimony received in evidence during complaint counsel's case in chief.
12-18-73	Response by counsel supporting complaint to motion by respondent (2) to dismiss or, for a stay based on failure to comply with the procedural rules. Mailed: Cahill, Gordon, Sonnett, Reindel & Ohl Sidley & Austin Walter W. Kocher
12-20-73	Opposition by counsel supporting complaint to motions of respondents to strike certain exhibits. Mailed: Cahill, Gordon, Sonnett, Reindel & Ohl Sidley & Austin Walter W. Kocher
12-20-73	Response by counsel supporting complaint in opposition to motions by respondents to strike certain testimony. Mailed: Cahill, Gordon, Sonnett, Reindel & Ohl Sidley & Austin Walter W. Kocher
12-20-73	Opposition by counsel supporting complaint to motions by respondents to dismiss for failure to state a prima facie case. Mailed: Cahill, Gordon, Sonnett, Reindel & Ohl Sidley & Austin Walter W. Kocher
1-4-74	Administrative law judge's certification to the Commission of request by respondent (2) for a stay of proceedings pending the Commission's ruling on its request for the release of certain information under the provisions of the Freedom of Information Act. Served: Cahill, Gordon, Sonnett, Reindel & Ohl - 1-7-74 Sidley & Austin - 1-7-74 Walter W. Kocher - 1-7-74

	HISTORY
1-4-74	Administrative law judge's order denying motion by respondent (1) to dismiss Count III of the complaint. Served: Cahill, Gordon, Sonnett, Reindel & Ohl - 1-7-74 Sidley & Austin - 1-7-74 Walter W. Kocher - 1-7-74
1-7-74	Administrative law judge's order denying motion by respondent (2) to strike the testimony of witness Hoffen at pages 3486 - 3490, and directing that the testimony of witness Holin at pages [illegible] through [illegible] of the transcript regarding Mr. Vinci and other dairies be stricken, and that in all other respects the motion to strike Holin's testimony is denied. Served: Cahill, Gordon, Sonnett, Reindel & Ohl - 1-10-74 Sidley & Austin - 1-10-74 Walter W. Kocher - 1-10-74
1-9-74	Request by respondent (2) for oral argument on its motion for a stay of proceedings which was certified to the Commission January 4, 1974, with certificate of service.
1-11-74	Request by respondent (2) for permission to file a reply of no more than ten pages in all to oppositions by counsel supporting complaint to motions to strike certain exhibits, and to dismiss for failure to state a prima facie case.
1-11-74	Order denying requests by respondent (2) for a stay of proceedings and for oral argument. Served: Cahill, Gordon, Sonnett, Reindel & Ohl - 1-16-74 Sidley & Austin - 1-16-74 Walter W. Kocher - 1-16-74
1-1[illegible]	[illegible] with [illegible] submitted by respondent [illegible].

(continued on reverse side of sheet)

HISTORY

1-14-74 Answer by counsel supporting complaint in opposition to request by respondent (1) for oral argument on motion for a stay of proceedings.
Mailed:
Cahill, Gordon, Sonnett, Reindel & Ohl
Sidley & Austin
Walter W. Kocher

1-17-74 Opposition by counsel supporting complaint to request by respondent (1) for permission to file replies to opposition to motion to strike certain exhibits and opposition to motion to dismiss.
Mailed:
Cahill, Gordon, Sonnett, Reindel & Ohl
Sidley & Austin
Walter W. Kocher

1-17-74 Administrative law judge's notice scheduling a prehearing conference for January 30, 1974, at 1 p.m., Washington, D.C., Room 7312, 414 - 11th Street, N.W.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 1-21-74
Sidley & Austin - 1-21-74
Walter W. Kocher - 1-21-74

1-22-74 Administrative law judge's order denying motions by respondents to strike testimony of Dr. Kuhlman.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 1-24-74
Sidley & Austin - 1-24-74
Walter W. Kocher - 1-24-74
John Kuhlman - 1-24-74

1-22-74 Reply by respondent (1) to opposition by counsel supporting complaint to its motions to strike certain exhibits and to dismiss count III of the complaint.

1-28-74 Request by respondent (1) for admissions by counsel supporting complaint as to certain facts.

1-28-74 Trial brief submitted by respondent (1).

HISTORY

1-[illegible]-74 Proposed supplemental [illegible] by respondent (1), with attachments.

1-[illegible]-74 Trial brief submitted by respondent [illegible].

2-1-74 Reply by counsel supporting complaint to request by respondent (1) for admissions.
Mailed:
Cahill, Gordon, Sonnett, Reindel & Ohl
Sidley & Austin
Walter W. Kocher

2-4-74 Administrative law judge's order [illegible] ruling on motions by respondents to dismiss Count III of the complaint.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 2-[illegible]-74
Sidley & Austin - [illegible]-74
Walter W. Kocher - [illegible]-74

2-[illegible]-74 Supplement to proposed witness list submitted by respondent [illegible].

2-21-74 Administrative law judge's order setting hearings to begin March 1[illegible], 1974, at 10 a.m., Washington, D.C., Room [illegible], 414 11th Street, N. W.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 2-25-74
Sidley & Austin - 2-[illegible]-74
Walter W. Kocher - [illegible]-74

2-26-74 Administrative law judge's notice directing that hearings for presentation of the case in chief of respondent (2) will begin April 15, 1974, at 10:00 a.m., Washington, D.C., Room 7312, 414 - 11th Street, N.W.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - [illegible]-74
Sidley & Austin - 2-[illegible]-74
Walter W. Kocher - [illegible]-74

HISTORY

[illegible]-74 Motion by counsel supporting complaint to remove certain exhibits, and [illegible] "IN CAMERA" in the testimony, from the "in camera" file and placed in the exhibit binder.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 3-[illegible]-74
Sidley & Austin - 3-7-74
Walter W. Kocher - 3-7-74

3-5-74 Administrative law judge's order denying motion by respondents to strike certain exhibits.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 3-7-74
Sidley & Austin - 3-8-74
Walter W. Kocher - 3-7-74

3-11-74 Application by respondent (2) for issuance of a subpoena duces tecum for production of certain documents in the files of the Commission, with exhibits.

3-12-74 Administrative law judge's order removing certain exhibits from the in camera status.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 3-14-74
Sidley & Austin - 3-15-74
Walter W. Kocher - 3-14-74

3-1[illegible]-74 Response by counsel supporting complaint in opposition to application by respondent (2) for issuance of a subpoena duces tecum requiring production of documents in the files of the Commission.
Mailed:
Cahill, Gordon, Sonnett, Reindel & Ohl
Sidley & Austin
Walter W. Kocher

3-[illegible]-74 Administrative law judge's order [illegible] motion by respondent (2) for the issuance of a subpoena duces tecum to the Secretary of the Federal Trade Commission.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 3-[illegible]-74
Sidley & Austin - 3-28-74
Walter W. Kocher - 3-[illegible]-74

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HISTORY

3-28-74 Motion by respondent (1) for issuance of subpoena ad testificandum directed to Robert Thomas.

3-29-74 Motion by respondent (2) to determine the sufficiency of response by counsel supporting complaint to request for admissions.

3-29-74 Motion by respondent (2) for issuance of a subpoena ad testificandum to counsel supporting complaint, ~~with subpoena attached.~~

4-3-74 Answer by counsel supporting complaint in opposition to motion by respondent (2) to determine the sufficiency of response to request for admissions.
Mailed:
Cahill, Gordon, Sonnett, Reindel & Ohl
Sidley & Austin
Walter W. Kocher

4-4-74 Request by respondent (1) for admission of truth of relevent matters by counsel supporting complaint, with attachments.

4-4-74 Response by counsel supporting complaint in opposition to motion by respondent (2) for the issuance of a subpoena ad testificandum.
Mailed:
Cahill, Gordon, Sonnett, Reindel & Ohl
Sidley & Austin
Walter W. Kocher

4-5-74 Administrative law judge's order denying motion by respondent (2) for the issuance of subpoena ad testificandum directed to counsel supporting complaint.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl-4-10-74
Sidley & Austin - 4-10-74
Walter W. Kocher - 4-10-74

4-5-74 Administrative law judge's order on motion by respondent (1) to determine the sufficiency of response by counsel supporting complaint to its request for admissions.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl-4-10-74
Sidley & Austin - 4-10-74
Walter W. Kocher - 4-9-74

4-10-74 Objection by counsel supporting complaint to request by respondent (1) for admissions.
Mailed:
Cahill, Gordon, Sonnett, Reindel & Ohl
Sidley & Austin
Walter W. Kocher

4-10-74 Amended answer by counsel supporting complaint to outstanding requests by respondent (2) for admissions.
Mailed:
Cahill, Gordon, Sonnett, Reindel & Ohl
Sidley & Austin
Walter W. Kocher
McDermott, Will & Emery

5-17-74 Memorandum submitted by counsel supporting complaint in opposition to the admission in evidence of certain portions of proposed RAFA 66A-B and particularly the figures appearing in Column 5 thereof.
Mailed:
Cahill, Gordon, Sonnett, Reindel & Ohl
Sidley & Austin
Walter W. Kocher

5-29-74 Administrative law judge's notice scheduling additional hearing for June 7, 1974, at 10 a.m., Washington, D.C., Room 7312, 414-11th Street, N. W.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl-5-31-74
Sidley & Austin - 6-3-74
Walter W. Kocher - 5-31-74

6-3-74 Administrative law judge's order receiving exhibit RAFA 66 in evidence.
Served:
Cahill Gordon Sonnett, Reindel & Ohl-6-5-74
Sidley & Austin - 6-6-74
Walter W. Kocher - 6-6-74

6-12-74 Administrative law judge's notice that hearings will continue July 2, 1974, at 10:30 a.m., Washington, D.C., Room 7314, 414 11th St., N.W.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl-6-13-74
Sidley & Austin - 6-17-74
Walter W. Kocher - 6-17-74

(cont'd on reverse side of sheet)

SHEET [illegible]

PAGES

Washington, D. C.
May 2, 1974-[illegible] - [illegible]
May 3, 1974-7791 - [illegible]
May 6, 1974-[illegible] - [illegible]
May 7, 1974-[illegible] - [illegible]
May 8, 1974-[illegible] - [illegible]
May 9, 1974-[illegible] - [illegible]
May 10, 1974-[illegible] - [illegible]
May 13, 1974-8574 - [illegible]
May 14, 1974-[illegible] - [illegible]
May 15, 1974-[illegible] - [illegible]
May 20, 1974-8833 - [illegible]
May 23, 1974-[illegible] - [illegible]
May 28, 1974-[illegible] - [illegible]
May 29, 1974-[illegible] - [illegible]
July 31, 1974-[illegible] - [illegible]
[illegible]
Sept.[illegible], 1974-9318-[illegible]
Sept.25, 1974-9426 - [illegible]
Oct. [illegible], 1974-[illegible]526 - [illegible]
Dec. 2, 1974-[illegible] - [illegible]
Dec. 1[illegible], 1974-9633-97[illegible]
Dec. 20, 1974-9767- 97[illegible]
March 5, 1975 -9793-98[illegible]5
(oral arg) Feb. 25, 1976 1 - 73
[illegible]

1-14
[illegible]
RESP. A&P EXHS. [illegible] - 254
RESP. BORDEN EXHS. [illegible] - 37
REJECTED EXHIBITS

7-23-74 Administrative law judge's order scheduling hearing for July 31, 1974 at 10:30 a.m., Washington, D. C., Room 785, Federal Trade Commission Bldg., 7th and Pennsylvania Avenue, N. W.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 7-25-74
Sidley & Austin - 7-26-74
Walter W. Kocher - 7-26-74

8-9-74 Objections by counsel supporting complaint to receipt of RAPX 108A-R, 139A-B and 200-B
Mailed:
Cahill, Gordon, Sonnett, Reindel & Ohl
Sidley & Austin
Walter W. Kocher

8-9-74 Objections by counsel supporting complaint to receipt in evidence of Mr. Havemeyer's cost justification exhibits and related exhibits, with appendix A.
Mailed:
Cahill, Gordon, Sonnett, Reindel & Ohl
Sidley & Austin
Walter W. Kocher

8-23-74 Motion by respondent (2) for an order placing certain exhibits in camera.

8-27-74 Response by counsel supporting complaint to motion by respondent (2) for order placing certain exhibits IN CAMERA
Mailed:
Cahill, Gordon, Sonnett, Reindel & Ohl
Sidley & Austin
Walter W. Kocher

8-30-74 Administrative law judge's order granting IN CAMERA status to A & P Exhibits 236 F and G, 133 G (Buttermilk Formula only) 134 A (Except the formula for two percent milk) and 134 B; such status will expire August [illegible], 1977.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 9-5-74
Sidley & Austin - 9-5-74
Walter W. Kocher- 9-5-74

9-3-74 Memorandum by respondent (1) in support of its offer of proof relating to the Sloverson time standards.

9-3-74 Answer by respondent (1) to objections by counsel supporting complaint to the receipt in evidence of RAPX 108A-R, [illegible] and 200-B.

9-3-74 Memorandum by respondent, in response to objections by counsel supporting complaint to Mr. Havemeyer's cost justification exhibits.

9-5-74 Administrative law judge's notice scheduling hearing for September [illegible], 1974, at 10:00 a.m. Washington, D.C., Room [illegible], [illegible] Building, 414-11 St., N.W.
Served:
Cahill, Gordon, Sonnet, Reindel & Ohl - 9-6-74
Sidley & Austin - 9-9-74
Walter W. Kocher - 9-[illegible]-74

9-5-74 Administrative law judge's order re admission of RAPX 108A-R, 139A-B & 200-B; and directing that the three exhibits be withdrawn.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 9-10-74
Sidley & Austin - 9-11-74
Walter W. Kocher - 9-10-74

9-6-74 Reply by respondent (2) to response by counsel supporting complaint to motion for order placing certain exhibit IN CAMERA.

9-12-74 Response by counsel supporting complaint in opposition to memorandum by respondent (1) regarding certain Wisconsin time figures of Doctor Solverson.
Mailed:
Cahill, Gordon, Sonnett, Reindel & Ohl
Sidley & Austin
Walter W. Kocher

9-12-74 Administrative law judge's order directing that objections by counsel supporting complaint to the reception in evidence of certain exhibits are overruled and Exhibits RAPX 109-123, 140-203, 219-221, 223-229, 232-234 & 239 are received in evidence.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl- 9-16-74
Sidley & Austin - 9-16-74
Walter W. Kocher - 9-16-74

9-18-74 Administrative law judge's order directing that objections by counsel supporting complaint to reception in evidence of A & P exhibits for which underlying data were not produced is sustained and further directing that counsel supporting complaint will, on or before September [illegible], 1974, furnish counsel for respondents a list of exhibits or parts of exhibits so affected by this rulings.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl- 9-20-74
Sidley & Austin - 9-23-74
Walter W. Kocher - 9-20-74

9-20-74 Administrative law judge's order denying motion by respondent (1) for reconsideration of ruling re Solverson time standards.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 9-23-74
Sidley & Austin - 9-24-74
Walter W. Kocher - 9-23-74

11-4-74 Memorandum and motion by respondent (1) for reconsideration of ruling excluding the Havemeyer exhibits based on the Solverson time standards, for further hearing in A&P's case - in - chief; and for hearings in A&P's surrebuttal case.

11-7-74 Letter from counsel for respondent transmitting page 6 of document filed November 4, 1974 re motion and memorandum for reconsideration, etc, with ~~page 6 attached~~.

11-14-74 Response by counsel supporting complaint to memorandum and motion by respondent (1) for reconsideration.
Mailed:
Cahill, Gordon, Sonnett, Reindel & Ohl
Sidley & Austin
Walter W. Kocher

11-20-74 Reply by respondent (1) to response by counsel supporting complaint to motion for reconsideration of the ruling excluding the Havemeyer exhibits based on the Solverson time standards.

[illegible]

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No. 8866

Sheet: 6

SKELETON

8866-2 Testimony - (continued)
8866-2-16 9318 -

HISTORY

11-21-74 Administrative law judge's order re exhibits involved in A & P cost justification with list of exhibits.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 11-25-74
Sidley & Austin - 11-26-74
Walter W. Kocher - 11-25-74

11-21-74 Administrative law judge's order scheduling prehearing conference for December 2, 1974 at 10:30 a.m., Washington, D.C. Room 7312, 1101 Building, 414-11th Street, N.W.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 11-25-74
Sidley & Austin - 11-26-74
Walter W. Kocher - 11-25-74

11-25-74 Administrative law judge's order denying motions by A & P for reconsideration of ruling excluding the Havemeyer Exhibits based on the Solverson time standards; and for further hearing on A & P's case-in-chief; and directing that A & P submit a proposed timetable for surrebuttal hearings, etc.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 11-26-74
Sidley & Austin - 11-27-74
Walter W. Kocher - 11-26-74

12-3-74 Administrative law judge's order scheduling hearings for December 19, 1974 at 9:30 a.m. Washington, D.C., Federal Trade Commission Building, 6th & Pennsylvania Avenue, N.W. said hearing to continue on December 20,& 23rd if necessary
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 12-5-74
Sidley & Austin - 12-5-74
Walter W. Kocher - 12-5-74

12-10-74 Administrative law judge's order correcting exclusion list in order of November 20, 1974 with attachments.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 12-13-74
Sidley & Austin - 12-13-74
Walter W. Kocher - 12-13-74

12-10-74 Proposed witness and exhibit list by respondent (1) on its surrebuttal case.

HISTORY

1-21-75 Joint motion by counsel for both parties requesting the administrative law judge to certify to the Commission a request for an extension of time to file briefs in this matter.

1-23-75 Administrative law judge's certification of request for extension of time of seventy-five days after the record is closed for counsel supporting complaint to file proposed findings and briefs, fifty-five days thereafter for respondents to file their proposed findings and briefs, twenty-five days thereafter for complaint counsel to file their reply brief, and ninety days following for filing of his initial decision in this matter, for a total of on-hundred and forty-five (145) days following the closing of the record on January 31, 1975, with attachments.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 1-27-75
Sidley & Austin - 1-27-75
Walter W. Kocher - 1-27-75

2-4-75 Order granting extension of time to administrative law judge for filing initial decision.
Mailed:
Cahill, Gordon, Sonnett, Reindel & Ohl
Sidley & Austin
Walter W. Kocher

2-25-75 Administrative law judge's order scheduling further hearings for March 5, 1975, at 10:30 a.m., Washington, D.C., Room 7312, 414-11th Street, N.W.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl- 2-27-75
Sidley & Austin - 2-28-75
Walter W. Kocher - 2-27-75

3-17-75 Administrative law judge's order setting hearing for March 25, 1975, at 2:00 p.m., Washington, D.C., Room7314, 1101 Building 414-11th Street, N.W. to close record.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 3-20-75
Sidley & Austin - 3-20-75
Walter W. Kocher - 3-20-75

3-24-75 Administrative law judge's order cancelling and rescheduling hearing for March 27, 1975 to close record.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl- 3-28-75

5-19-75 Proposed findings of fact conclusions of law and order (Vol 1) filed by counsel supporting complaint.
Mailed:
Cahill, Gordon, Sonnett, Reindel & Ohl
Sidley & Austin
Walter W. Kocher

5-19-75 In Camera appendix (Vol 1-A) filed by counsel supporting complaint.
IN CAMERA
Mailed:
Cahill, Gordon, Sonnett, Reindel & Ohl
Sidley & Austin
Walter W. Kocher

5-19-75 Proposed findings of fact conclusions of law regarding cost studies of respondent (1), (Vol II) filed by counsel supporting complaint.
Mailed:
Cahill, Gordon, Sonnett, Reindel & Ohl
Sidley & Austin
Walter W. Kocher

6-17-75 Proposed findings of fact, legal arguments, conclusions and order, (Vol. I) filed by respondent (1).

6-17-75 Proposed findings of fact, legal arguments conclusions and order (Vol. II), filed by respondent (1).

6-17-75 Proposed findings of fact and conclusions of law with respect to count III, filed by respondent (2)

7-2-75 Reply by counsel supporting complaint to proposed findings of fact, conclusions of law and supporting memoranda filed by respondents.
Mailed:
Cahill, Gordon, Sonnett, Reindel & Ohl
Sidley & Austin
Walter W. Kocher

7-2-75 Request by respondent (1) for permission to file a surreply to the reply by counsel supporting complaint to their proposed findings of fact, conclusions of law and supporting memoranda.

7-3-75 Opposition by counsel supporting complaint to request by respondent (1) for permission to file surreply.

7-7-75 Administrative law judge's order granting permission for respondent (1) to file surreply no more than [illegible] - [illegible] pages to be submitted within one working day.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 7-10-75
Sidley & Austin - 7-10-75
Walter W. Kocher - 7-10-75

7-10-75 Surreply by respondent (1) to reply by counsel supporting complaint to their proposed findings of fact, conclusions of law and supporting memoranda, with Appendix A.

7-30-75 Administrative law judge's certification to the Commission of his request for an extension of time to October 13, 1975 to file his initial decision.
(Mailed together with Commission order extending time).

8-5-75 Order extending time to September 24, 1975 to the administrative law judge to file his initial decision.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 8-11-75
Sidley & Austin - 8-11-75
Wlater W. Kocher - 8-11-75

9-22-75 Joint motion by counsel for the parties regarding transcript corrections, with attachments.

9-24-75 Administrative law judge's order correcting transcript.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 9-26-75
Sidley & Austin - [illegible]
Walter W. Kocher - [illegible]

9-24-75 Administrative law judge's initial decision and order [illegible]
(dismissing [illegible] respondent [illegible]).
Served:
CSC (A.G. Stern) - 10-7-75
CSC (E.M. S[illegible]) - 10-[illegible]
CSC (J.[illegible]) - 10-[illegible]
Cahill, Gordon, Sonnett, Reindel & Ohl - 10-9-75
Sidley & Austin - 10-9-75
Walter W. Kocher - 10-9-75

10-15-75 Notice by counsel supporting complaint of intent to appeal from administrative law judge's initial decision.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 10-20-75
Sidley & Austin - 10-20-75
Walter W. Kocher - 10-20-75

10-16-75 Notice by respondent (1) of intent to appeal administrative law judge's initial decision.

10-16-75 Motion by respondent (1) for permission to file a brief in excess of the sixty page limit, and for an extension of time to file said brief.

10-28-75 Order directing that time for the filing of appeal briefs by respondent (1) and counsel supporting complaint is extended until (45) days after service of the initial decision and the time for filing answering briefs is extended until (45) days after service of the other party's appeal brief; and granting request by respondent (1) and counsel supporting complaint to file appeal briefs in excess of sixty (60) pages, but not exceeding eighty (80) pages.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 10-31-75
Sidley & Austin - 11-4-75
Walter W. Kocher - 10-31-75

1-21-75 Brief by counsel supporting complaint - Appeal from administrative law judge's initial decision.
Served:
Cahill, Gordon, Sonnett, Reindel & Ohl - 11-[illegible]
Sidley & Austin -
Walter W. Kocher - 11-[illegible]-75

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11-24-75 Brief by respondent (1) - Appeal from administrative law judge's initial decision, with attachment.

(cont'd [illegible])

	HISTORY
11-24-75	Motion by respondent (1) requesting permission to lodge with the record additional documents, with annex A and B.
12-1-75	Opposition by counsel supporting complaint to motion by respondent (1) for leave to lodge certain additional documents into the closed record of this case. Mailed: Cahill, Gordon, Sonnett, Reindel & Ohl Sidley & Austin Walter W. Kocher
12-11-75	Request by respondent (1) for permission to file reply to opposition by counsel supporting complaint to motion for leave to lodge, with reply.
12-16-75	Opposition by counsel supporting complaint to request by respondent (1) for permission to file reply. Served: Cahill, Gordon, Sonnett, Reindel & Ohl - 12-19-75 Sidley & Austin - 12-19-75 Walter W. Kocher - 12-19-75
12-19-75	Order granting request by respondent (1) for permission to file a reply to opposition by counsel supporting complaint to its motion for leave to lodge in the record two documents which it claims are of relevance to the proceeding; and granting request by respondent (1) for leave to lodge said documents into the record of this case. (Commissioners Dixon and Nye voted in the affirmative; Chairman Engman abstained; Commissioner Hanford voted in the negative as to granting the motion for leave to lodge certain documents into the record of this case.) Served: Cahill, Gordon, Sonnett, Reindel & Ohl - 12-30-75 Sidley & Austin - 12-31-75 Walter W. Kocher - 12-30-75
1-5-76	Brief by respondent (2) - Answer to appeal by counsel supporting complaint from administrative law judge's initial decision on Count III.
1-7-76	Motion by counsel supporting complaint requesting that their time to file a reply to answering brief by respondent (2) with respect to Count III, be extended until their reply to brief by respondent (1) on the same subject is due. Served: Cahill, Gordon, Sonnett, Reindel & Ohl - 1-9-76 Sidley & Austin - 1-12-76 Walter W. Kocher - 1-9-76
1-8-76	Notice setting oral argument on cross-appeals of counsel supporting and respondent (1) from administrative law judge's initial decision for February 25, 1976, at 2:00 p.m., Washington, D. C. Served: Cahill, Gordon, Sonnett, Reindel & Ohl - 1-16-76 Sidley & Austin - 1-16-76 Walter W. Kocher - 1-16-76 Alderson Reporting Company - 1-15-76
1-9-76	Order granting motion by counsel supporting complaint for an extension of time to file reply to answering brief by respondent (2) until reply to brief by respondent (1) is due. Mailed: Cahill, Gordon, Sonnett, Reindel & Ohl Sidley & Austin Walter W. Kocher
1-12-76	Brief by counsel supporting complaint - Answer to appeal by respondent (1) from administrative law judge's initial decision. Served: Cahill, Gordon, Sonnett, Reindel & Ohl 1-15-76 Sidley & Austin - 1-15-76 Walter W. Kocher - 1-15-76
1-15-76	Brief by respondent (1) - Answer to appeal by counsel supporting complaint re reversal of that portion of the administrative law judge's initial decision, which dismissed Count III of the complaint.
1-26-76	Brief by counsel supporting complaint - Reply to answer by respondents to appeal from administrative law judge's initial decision, with respect to Count III. Mailed: Cahill, Gordon, Sonnett, Reindel & Ohl Sidley & Austin Walter W. Kocher
1-26-76	Brief by respondent (1) - Reply to answer by counsel supporting complaint to appeal from administrative law judge's initial decision, with respect to Counts I and II, with annex A.
2-12-76	Motion by respondents for clarification and modification of Commission's order of January 8, 1976, setting the time and place for oral argument on cross-appeals from Administrative Law Judge's Initial Decision; with affidavit of service.
2-12-76	Motion by respondent (1) for postponement of the oral argument until the present vacancies on the Commission are filled, with certificate of service.
2-12-76	Opposition by Counsel Supporting Complaint to motion by respondents for adjournment of oral argument. Mailed: Cahill, Gordon, Sonnett, Reindel, & Ohl Sidley & Austin Walter W. Kocher
2-18-76	Motion by Counsel Supporting Complaint for an additional fifteen (15) minutes to present oral argument. Served: Cahill, Gordon, Sonnett, Reindel, & Ohl - 2-23-76 Sidley & Austin - 2-24-76 Walter W. Kocher - 2-23-76
2-19-76	Order directing that motion by respondents to postpone oral argument is denied and further directing that the notice of oral argument is hereby amended to allow respondents a total of sixty (60) minutes, the time to be divided as deemed appropriate by respondents. (Commissioner Dixon and Commissioner Dale voted in the affirmative, and Commissioner Nye was recorded as voting in the affirmative). Served: Cahill, Gordon, Sonnett, Reindel, & Ohl - 2-24-76 Sidley & Austin - 2-25-76 Walter W. Kocher - 2-24-76

	HISTORY
2-20-76	Order granting motion by counsel supporting complaint for an additional fifteen (15) minutes in which to present oral argument on cross-appeals from administrative law judge's initial decision. Mailed: Cahill, Gordon, Sonnett, Reindel, & Ohl Sidley & Austin Walter W. Kocher
2-25-76	Oral Argument was heard on the cross-appeals of counsel from the administrative law judge's initial decision.
4-29-76	Order granting appeal by respondent from administrative law judge's initial decision. (Contained in Final Order issued April 29, 1976.
4-29-76	Final Order Adopting after modification administrative law judge's initial decision and order to cease and desist and order to file report of compliance. Opinion - Commission - Attached (Commissioners Dixon, Dole and Nye voted in the affirmative and Commissioner Collier did not participate in the resolution.) Served: The Great Atlantic & Pacific Tea Company, Inc. - 6-1-76 Borden, Inc. - 5-27-76 Cahill, Gordon, Sonnett, Reindel & Ohl - 5-27-76 Sidley & Austin - 5-27-76 Walter W. Kocher - 5-27-76
7-23-76	Petition for Review --------(filed by respondent (1). (For court action, see reverse side of sheet 7)

UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 73C 1187

Attorneys:

Stuart S. Ball
H. Blair White
William G. Schaefer, Jr.
William A. McLain
Sidley & Austin
One First National Plaza
Chicago, Illinois 60670

Walter W. Kocher
Borden, Inc.
277 Park Avenue
New York, New York 10017

5-9-73 Summons and complaint by Borden, Inc., for a preliminary injunction, with attachments. (RDS 5-31-73)

5-9-73 Opposition by Commission to motion by Borden, Inc., for a preliminary injunction, with attachments. (RDS 5-31-73)

5-21-73 Notice of motion and motion by Borden, Inc., moving the Court for a preliminary injunction enjoining the Commission, its staff, etc., pending the final hearing and determination of this action from any further proceedings upon the Federal Trade Complaint issued against Borden, on the grounds that: Unless restrained by this Court the Commission will perform the acts referred to and such action will result in irreparable injury, loss and damage to Borden, etc., with attachments. (RDS 5-31-73)

5-25-73 Supplemental affidavit of William G. Schaefer, Jr., filed. (RDS 7-27-73)

5-25-73 Supplemental memorandum in support of motion for preliminary injunction. (RDS 5-31-73)

5-31-73 Motion by Commission to dismiss, with memorandum in support of motion, etc. (RDS 7-27-73)

UNITED [illegible]
DISTRICT OF [illegible]

6-7-73 Memorandum Opinion and Order: Stating that the Court has concluded that it is deprived of jurisdiction of Count I by the doctrine of exhaustion of administrative remedies, and that even if it had jurisdiction, injunctive relief would not be warranted. Accordingly, the Commission's motion to dismiss that Count is granted and Borden's motion for a preliminary injunction is denied. (COURT NOTATION: It Is So Ordered: 6-7-73) (RDS 7-13-73)

6-8-73 Motion by Borden, Inc., for injunction pending appeal. (RDS 7-13-73)

6-8-73 Court Order: Denying motion by Borden, Inc., for injunction pending appeal.

6-8-73 Notice of appeal to the United States Court of Appeals for the Seventh Circuit, from the order of this Court dismissing the claim of Borden, Inc., for injunctive relief for want of jurisdiction entered June 7, 1973. (RDS 7-13-73)

6-13-73 Request by Borden, Inc., to the Clerk of this Court to assemble and transmit to the Clerk of the United States Court of Appeals for the Seventh Circuit the original papers and exhibits, the transcript of proceedings and a certified copy of the docket entries as the record on appeal. (RDS 7-13-73)

6-20-73 Memorandum by Commission in support of its motion to dismiss as it pertains to Count II of the complaint. (RDS 7-13-73)

7-18-73 Memorandum by Borden, Inc., in opposition to Commission's motion to dismiss Count II, with certificate of service. (RDS 7-31-73)

(cont'd. on reverse side of sheet, 2nd column)
(For [illegible], see next column)

[illegible]
SEVENTH CIRCUIT

No. [illegible]

Attorneys:

Stuart S. Ball
H. Blair White
William G. Schaefer, Jr.
William A. McLain
Sidley & Austin
One First National Plaza
Chicago, Illinois 60670

6-8-73 Notice of appeal from order of the United States District Court for the Northern District of Illinois, Eastern Division. Issued June 7, 1973.

6-8-73 Notice of emergency motion and emergency motion by Borden, Inc., for injunction pending appeal. (RDS 7-13-73)

6-8-73 Denying motion by Borden, Inc., for injunctio pending appeal.

6-8-73 Order:
6-8-73 Denying Borden's motion for preliminary injunction against the Commission and dismissing Count I of the complaint on which the motion for preliminary injunctio was based; and stating that an immediate appeal was taken from this ruling to the Seventh Circuit and a stay pending appeal was requested. Said stay was denied by this Court on June 8, 1973.

6-26-73 Court Order: Denying motion by counsel for Borden, Inc. for an order establishing an expedited briefing schedule and advancing the case for oral argument.

7-17-73 [illegible] appendix for Borden, Inc., filed. [illegible]

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

8-16-73 **Brief for Commission filed.**
(RDS 8-20-73)

8-28-73 Order:
Granting motion and affidavit of counsel for Borden, Inc., for extension of time of fourteen (14) days from and after August 30, 1973.

9-13-73 Reply brief for Borden, Inc., filed.
(RDS 10-16-73)

1-18-74 Oral argument set for Monday, February 25, 1974. at 9:30 a.m.

2-13-74 Notice of filing and motion by Borden, Inc. to enlarge the record to include important relevant facts, with attachments.
(RDS 4-9-74)

2-14-74 Court Order:
Directing the Commission to file a response to motion by Borden, Inc., to enlarge the record on or before February 21, 1974.
(RDS 3-5-74)

2-21-74 Response by Commission to motion by Borden, Inc. to enlarge the record.

2-22-74 Court Order:
Directing that motion for enlargement of the record, with response thereto be taken and considered with the merits of this appeal at the time of its oral argument.
(RDS 3-5-74)

2-25-74 Oral argument heard.

5-1-74 Decision:
Affirming the judgment of the United States District Court for the Northern District of Illinois, dated June 13.1973. dismissing Count I of the Complaint. Opinion.
(RDS 5-12-74)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

7 C[illegible]

10-29-73 Memorandum Opinion and Order:
Stating that the Court is not persuaded that the Commission's jurisdiction over this matter is so clearly lacking that Borden should not have to exhaust its administrative remedies. Accordingly, the Commission's motion to dismiss Count II of the complaint is granted.
(COURT NOTATION: So ordered - 10-29-73)
(RDS 11-5-73)

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 76-4179

Attorneys:

Denis McInerney

Cahill, Gordon & Reindel
80 Pine Street
New York, New York 10005

7-23-76 Petition for Review filed by respondent Great Atlantic & Pacific Tea Company, Inc.
(RDS 8-4-76)

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4-[illegible]-74 [illegible], U. S. [illegible]
James F. Halvers [illegible]

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UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of

THE GREAT ATLANTIC & PACIFIC
TEA COMPANY, INC.,
a corporation, and
BORDEN, INC.,
a corporation.

DOCKET NO. 8866

COMPLAINT

The Federal Trade Commission, having reason to believe that respondent The Great Atlantic & Pacific Tea Company, Inc. (hereinafter referred to as A & P), has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C., Section 45) and the provisions of subsection (f) of Section 2 of the Clayton Act (15 U.S.C. Section 13f) as amended by the Robinson-Patman Act, approved June 19, 1936, and that respondent Borden, Inc. (hereinafter referred to as Borden), has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C., Section 45), and it appearing to the Commission that a proceeding by it would be in the public interest, hereby issues its complaint charging as follows:

COUNT I

PARAGRAPH ONE: Respondent A & P is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland with its principal office and place of business located at 420 Lexington Avenue, New York, New York 10017.

PARAGRAPH TWO: Respondent A & P is now, and for many years has been engaged in the operation of a large chain of retail grocery stores. There are presently more than 4500 stores operated by respondent in 34 states of the United States, the District of Columbia and in Canada. Respondent A & P also operates a number of plants for the manufacture and processing of food and other products handled in its stores, including plants which process and manufacture milk and other dairy products. A & P's annual sales for the fiscal year ended February 22, 1969, totalled over $5,436,325,000.00 and for the fiscal year ended February 28, 1970, they totalled $5,753,692,000.00.

COMPLAINT

Included among A & P's retail grocery chain stores are approximately 250 or more stores located in the States of Illinois (including the Chicago metropolitan area), Indiana and Iowa, which stores comprise the Chicago Division of A & P. This Division was formerly identified as the Chicago Unit of A & P's Middle Western Division.

PARAGRAPH THREE: In the course and conduct of its business, respondent A & P has been and is now engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act and the amended Clayton Act. In the course of that commerce A & P has been purchasing grocery and household products, including milk and other dairy products, for resale within the United States, from sellers also engaged in "commerce," as commerce is defined in the Federal Trade Commission Act and the amended Clayton Act.

In connection with such transactions, A & P is now, and has been, in active competition with other corporations, partnerships, firms and individuals also engaged in the purchase for resale and resale of grocery and household products, including milk and other dairy products, of like grade and quality which are purchased from the same or competitive sellers.

The aforesaid sellers are located in the various states of the United States, and respondent A & P and such sellers cause the products when purchased by said respondent, to be transported from the place of processing, manufacture or purchase, to A & P's retail stores and warehouses located in the same state and various other states of the United States. Further, in many instances the sellers must purchase or obtain raw materials, supplies and finished products from states other than the state in which such products are processed, manufactured or purchased as aforesaid, in order to fulfill the obligations of said sellers in their commitments to supply respondent A & P.

PARAGRAPH FOUR: Respondent Borden (formerly The Borden Co.) is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey with its principal office and place of business located at 350 Madison Avenue, New York, New York 10017.

PARAGRAPH FIVE: Respondent Borden is a holding and operating company having on December 31, 1969, a 100% voting power in approximately 22 subsidiary corporations.

Respondent Borden has approximately 200 plants in the United States and Canada that are managed by four operating divisions. A diversified dairy business, including virtually all branches thereof, is conducted by Borden's Dairy and Services Division (formerly the Milk and Ice Cream Division). For this division, Borden's chief trade name is "Borden."

Respondent Borden owns, maintains and operates a large number of receiving stations, processing and manufacturing plants and distribution depots located in various states of the United States from which it sells and distributes its said products to purchasers.

Borden's net sales amounted to approximately $1,740,184,687.00 in 1969 and approximately $1,827,341,000.00 in 1970.

PARAGRAPH SIX: Respondent Borden sells milk and other dairy products of like grade and quality to a large number of purchasers located throughout the states of the United States, including the States of Illinois, Indiana and Iowa, for use, consumption or resale therein.

PARAGRAPH SEVEN: In the course and conduct of its business, respondent Borden is now, and for many years past has been, transporting raw milk, or causing the same to be transported, from dairy farms and other points of origin to said respondent's receiving stations, processing and manufacturing plants and distribution depots located in states other than the state of origin.

Respondent Borden is now, and for many years past has been, transporting milk and other dairy products, or causing the same to be transported, from the state or states where such products are processed, manufactured or stored in anticipation of sale or shipment to purchasers located in other states of the United States.

Respondent Borden also sells and distributes its said milk and other dairy products to purchasers located in the same states and places where such products are manufactured or stored in anticipation of sale.

COMPLAINT

All of the matters and things, including the acts, practices, sales and distribution by respondent Borden of its said milk and other dairy products, as hereinbefore alleged, were and are performed and done in a constant current of commerce, as "commerce" is defined in the Federal Trade Commission Act.

PARAGRAPH EIGHT: Respondent Borden sells its milk and other dairy products to retailers. Borden's retailer-purchasers resell to consumers. Many of said respondent's retailer-purchasers are in competition with other retailer-purchasers of Borden.

PARAGRAPH NINE: In the course and conduct of its business in commerce, respondent A & P has entered into an agreement with respondent Borden for the supply of milk and other dairy products, packaged under A & P's own private label, to the majority of the stores of A & P's Chicago Division (Chicago Unit at the time of initiation of the agreement). At the time Borden tendered its final offer to A & P, the offer which was accepted to form the said agreement, Borden informed respondent A & P that the offer was being granted for the purpose of meeting competition in the form of an existing offer or offers which A & P then had in its possession. A & P accepted the said offer of Borden with knowledge that Borden had granted a substantially lower price than that offered by the only other competitive bidder and without notifying Borden of this fact.

By the term private label, it is meant that such products were packaged under labels bearing brand names owned by A & P or peculiar to the retail operations of A & P, its divisions and subsidiaries, rather than under labels displaying brand names owned by Borden or peculiar to the operations of Borden.

PARAGRAPH TEN: The aforegoing act and practice of respondent A & P violates the policy of Section 2 of the Clayton Act, as amended, is to the prejudice of the public and constitutes an unfair method of competition in commerce and an unfair act or practice in commerce within the intent and meaning and in violation of Section 5 of the Federal Trade Commission Act. (15 U.S.C., Section 45).

Count II

PARAGRAPH ELEVEN: Paragraphs One through Ten of Count I hereof are hereby set forth by reference and made a part of this count as fully and with the same effect as if quoted herein verbatim.

PARAGRAPH TWELVE: In the course and conduct of its business in commerce, respondent A & P has knowingly induced or received discriminations in price which are prohibited by subsection (a) of Section 2 of the Clayton Act, as amended.

Respondent A & P, in its negotiations with respondent Borden, before and after November 1, 1965, for the supply of milk and other dairy products under private label to the stores of A & P's Chicago Unit (now Division), knowingly induced prices which were and are discriminatory under the provisions of Section 2 of the amended Clayton Act. Further, respondent A & P has knowingly induced or received prices from Borden in the purchase of such products for said stores which said prices were and are discriminatory under the provisions of Section 2 of the amended Clayton Act.

PARAGRAPH THIRTEEN: When respondent A & P knowingly induced or received the discriminatory prices from its supplier, as alleged, A & P knew or should have known that such prices constituted discriminations in price prohibited by subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

PARAGRAPH FOURTEEN: The aforegoing acts and practices of A & P are in violation of subsection (f) of Section 2 of the Clayton Act, as amended.

Count III

PARAGRAPH FIFTEEN: Paragraphs One through Thirteen of Counts I and II hereof are hereby set forth by reference and made a part of this count as fully and with the same effect as if quoted herein verbatim.

PARAGRAPH SIXTEEN: During the negotiations and dealings between respondents, before and after November 1, 1965, there developed a course of conduct to be followed by respondents. Pursuant thereto, A & P, for its part, introduced and sold private label milk and other dairy products at the prevailing retail price level for vendor label milk and dairy products, in spite of the fact that it was paying as much as 11 cents per gallon less for private label milk than it was paying for vendor (Borden) label milk. Thus, for its part in said course of conduct, A & P sustained and maintained existing retail prices for milk and other dairy products, and did not pass on to the consuming public any of the substantial price savings on private label milk and other dairy products which it received by reason of the wholesale price given it by Borden.

Further, pursuant to said course of conduct, Borden, for its part, failed to pass on, at the wholesale level, price reductions, similar to the reductions granted to A & P, to other purchasers who compete with A & P in the market areas covered by A & P's Chicago Unit (now Division).

The foregoing course of conduct constitutes a combination between respondents which had the tendency or effect of stabilizing and maintaining prices for milk and other dairy products. Said combination had the further effect of permitting A & P to retain the substantial monetary and competitive benefits of the discriminatory price advantage which it had obtained as a result of its private label agreement with Borden.

PARAGRAPH SEVENTEEN: The aforegoing acts and practices of respondents A & P and Borden are to the prejudice of the public and constitute unfair methods of competition in commerce and unfair acts or practices in commerce within the intent and meaning and in violation of Section 5 of the Federal Trade Commission Act. (15 U.S.C., Section 45).

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this 8thday ofOctober,A. D., 1971, issues its complaint against respondent.

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FEDERAL TRADE COMMISSION
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UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

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In the Matter of :

THE GREAT ATLANTIC & PACIFIC :
TEA COMPANY, INC.,
a corporation, and :

BORDEN, INC., :
a corporation.
:

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Docket No. 8866

Filed
Signed
Received

11/18/71 BF
not entered 11/19/71. MHC

ANSWER OF RESPONDENT THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.

Respondent, The Great Atlantic & Pacific Tea Company, Inc. ("A&P"), by its attorneys, Cahill, Gordon, Sonnett, Reindel & Ohl, for its answer to the complaint alleges as follows:

1. Admits the allegations of PARAGRAPH ONE and PARAGRAPH TWO except alleges that A&P presently operates 4,329 stores in 36 States of the United States, the District of Columbia and Canada, 236 of which stores comprise A&P's Chicago Division.

2. In answer to PARAGRAPH THREE: With respect to the first paragraph thereof, admits that in the course and conduct of certain aspects of its business A&P has been and is now engaged in commerce, as "commerce" is

defined in the Federal Trade Commission Act and the amended Clayton Act, but denies the other allegations of such paragraph. With respect to the second unnumbered paragraph thereof, admits that A&P is and has been in active competition with other corporations, partnerships, firms and individuals engaged in the purchase for resale and resale of grocery and household products, including milk and other dairy products, that some of such products are of like grade and quality and that some of such products are purchased from the same or competitive sellers, but denies the other allegations of such paragraph. With respect to the third unnumbered paragraph thereof, admits that A&P purchases grocery and household products from sellers located in various States of the United States, that before or after purchase by A&P such products may be transported from the place of processing or manufacture to A&P's retail stores or warehouses, some of which are located in the State in which products purchased by A&P are processed or manufactured and some of which are not, admits the allegations of the second sentence of such paragraph, but denies the other allegations of such paragraph.

3. In answer to PARAGRAPH FOUR, admits upon

information and belief that Borden is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey with its principal office and place of business located at 277 Park Avenue, New York, New York.

4. Denies having information sufficient to form a belief as to the correctness of the allegations of PARAGRAPH FIVE, PARAGRAPH SIX and PARAGRAPH SEVEN.

5. Upon information and belief, admits the allegations of PARAGRAPH EIGHT.

6. In answer to PARAGRAPH NINE, admits that A&P, beginning in November, 1965, has purchased from Borden milk and other dairy products, packaged under A&P's own private label, for resale in a majority of the stores of A&P's Chicago Division, admits the second unnumbered paragraph of such paragraph, but denies the other allegations of PARAGRAPH NINE.

7. Denies the allegations of PARAGRAPH TEN.

8. In answer to PARAGRAPH ELEVEN, realleges paragraphs 1 through 7 hereof.

9. Denies each and every allegation of PARAGRAPH TWELVE, PARAGRAPH THIRTEEN and PARAGRAPH FOURTEEN.

10. In answer to PARAGRAPH FIFTEEN, realleges paragraphs 1 through 9 hereof.

11. Denies each and every allegation of PARAGRAPH SIXTEEN and PARAGRAPH SEVENTEEN.

AFFIRMATIVE DEFENSES

12. Count I of the complaint fails to state a violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45).

13. Count II of the complaint fails to state a violation of subsection (f) of Section 2 of the Clayton Act, as amended (15 U.S.C. § 13(f)).

14. Count III of the complaint fails to state a violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45).

15. Upon information and belief, any differential between any price charged by Borden to any competitor

of A&P and any price charged by Borden to A&P for a product of like grade and quality made only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such product was sold or delivered to A&P.

16. In purchasing milk and other dairy products from Borden, A&P acted in good faith reliance upon Borden's representation and warranty that the prices for such milk and other dairy products were lawful prices.

17. In purchasing milk and other dairy products from Borden, A&P acted in the good faith belief that any differential between any price charged by Borden to any competitor of A&P and any price charged by Borden to A&P for a product of like grade and quality made only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such product was sold or delivered to A&P.

18. At the time it received private label price quotations from Borden in the fall of 1965, A&P believed in good faith that other grocery chains in the Chicago Metropolitan Area which are major competitors of A&P were buying milk and dairy products, including private label milk and dairy products, at prices as low as or lower than the prices

then being quoted to A&P by Borden.

19. Borden did not disclose to A&P in any manner reasonably calculated to inform A&P that it was Borden's position that the only justification for the prices for private label milk and other dairy products sold by Borden to A&P was "meeting competition."

20. At no time did A&P, or any of its officers, employees or agents, mislead or misinform Borden or make any misstatement to Borden with respect to the existence or the nature of price quotations for milk and other dairy products made to A&P by competitors of Borden.

Dated: New York, New York
November 15, 1971

Respectfully submitted,

CAHILL, GORDON, SONNETT, REINDEL
& OHL

By Denis McInerney
Denis McInerney

By Marshall H. Cox
Marshall H. Cox, Jr.
Attorneys for Respondent
The Great Atlantic & Pacific
Tea Company, Inc.
80 Pine Street
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(212) WHitehall 4-7400

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

- x

In the Matter of :

THE GREAT ATLANTIC & PACIFIC :
TEA COMPANY, INC.,
a corporation, and :

BORDEN, INC., :
a corporation.
:

- x

Docket No. 8866

APPLICATION OF RESPONDENT THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC. FOR ISSUANCE OF SUBPOENA DUCES TECUM AND FOR VACATION OR MODIFICATION OF ORDER

Respondent The Great Atlantic & Pacific Tea Company, Inc. ("A&P") hereby applies,

(i) Pursuant to Rules 3.34 and 3.36 of the Commission's Rules of Practice and the Freedom of Information Act, 5 U.S.C. § 552, for issuance of a subpoena duces tecum directed to Charles A. Tobin, Secretary, Federal Trade Commission, Washington, D. C., requiring him to appear before Hearing Examiner Schrup at a prehearing conference, at a time and place designated by the Hearing Examiner, for the purpose of producing for inspection and copying certain documents in his possession, custody or control; and

(ii) Pursuant to Rules 3.22 and 3.33(d) of the Commission's Rules of Practice for an order either vacating the order of the Hearing Examiner dated November 8, 1971 authorizing counsel supporting the complaint to take the depositions of Ralph R. Minkler, Gordon Tarr and Joseph Malone beginning December 1, 1971 in Chicago, Illinois, or modifying the order dated November 8, 1971 to reschedule the depositions of such individuals to commence one week after the return date fixed by the Hearing Examiner for the subpoena duces tecum requested in (i) above.

The documents which A&P seeks to have produced for inspection and copying are the following:

1. All transcripts of testimony, statements and affidavits of officers, employees or representatives of respondent Borden, Inc. ("Borden") or former officers, employees or representatives of Borden (including without limitation Ralph R.

Minkler, Gordon Tarr and Joseph Malone), and all documents containing statements by and all reports and memoranda of interviews or conferences with such officers, employees or representatives or former officers, employees or representatives of Borden (including without limitation Ralph R. Minkler, Gordon Tarr and Joseph Malone) relating in any way to the subject matter of the complaint herein;

2. All documents referred to or described in any of the foregoing transcripts, statements, affidavits, reports and memoranda;

3. All documents obtained in conjunction with Commission Investigation No. 671 0149 which refer or relate to contracts, proposals, negotiations, costs, cost savings, possible cost savings, meeting competition, prices, terms of trade or delivery terms for the supply or sale of milk or other dairy products (including private label milk and other dairy products) in the States of Illinois, Indiana or Iowa;

4. All documents obtained in conjunction with Commission Investigation No. 671 0149 which contain

or refer to any market share figures, results of any market analysis, survey, study, statement or comment as to the market share or market position of any seller or buyer of milk or other dairy products in all or any part of the geographic area referred to in the complaint as having been served by A&P's Chicago Division (formerly Chicago Unit);

5. All documents which show for any time, between January 1, 1964 and October 14, 1971, the actual, offered or proposed prices or terms of sale or delivery of milk or other dairy products to stores in A&P's Chicago Division (formerly Chicago Unit) or any competitor of such stores;

6. All documents which indicate, support or would tend to establish that any lower price charged by Borden to A&P, as alleged in the complaint herein, was made to meet the prices of a competitor of Borden; and

7. All documents which contain any evidence favorable to A&P herein, including any evidence which might weaken or overcome testimony adverse to A&P likely to be given by any witness or witnesses intended to be called by counsel supporting the complaint or any evidence which might otherwise be

construed to be directly or indirectly exculpatory of any act or conduct alleged in the complaint to have been committed or engaged in by A&P.

The term "documents" is used in a comprehensive sense and includes without limitation letters, reports, memoranda, minutes, bulletins, circulars, notes, electronic recordings, charts, drawings, drafts, worksheets, advertisements, and other writings or printed matter of any nature, including copies of any kind of any of such items. If any requested documents are deemed privileged or confidential, pursuant to Rule 4.10 or otherwise, each such document and the specific parts deemed privileged, confidential or otherwise not subject to discovery shall be identified, and the grounds on which the claim of privilege or confidentiality rests shall be separately stated as to each.

In support of its application for a subpoena duces tecum requiring the production of the above-described documents, and in support of its application that either the Hearing Examiner's order of November 8, 1971 be vacated or the scheduled depositions be deferred pending completion of documentary discovery requested by this application, A&P asserts as follows with respect to the general relevancy of the material requested, the reasonableness of the scope of the subpoena and the need for vacating the order or deferring the requested depositions:

It is plain that the Hearing Examiner's order granting the application to take depositions by counsel supporting the complaint effectively amounts to an order that the hearing on the merits in this proceeding will commence with the depositions of these three witnesses. The purpose of these depositions is not to seek discovery, as counsel for the complaint have already had full discovery of A&P and Borden in protracted investigatory proceedings that have extended over several years. The stated purpose of these depositions is to preserve the testimony of three individuals - Ralph R. Minkler, Gordon Tarr and Joseph Malone - who, from what counsel supporting the complaint have said in their ex parte application for an order authorizing the depositions, are obviously the key witnesses upon whose testimony the case in support of the complaint will chiefly depend. Counsel supporting the complaint have requested that the Hearing Examiner be present at the taking of these depositions, and he has agreed to do so, because "it is expected the question of credibility among witnesses for the parties may arise and become important at the trial." The subject matters that counsel supporting the complaint expect these witnesses to testify about are described in detail in the Hearing Examiner's November 8, 1971 order in a statement that confirms in all respects A&P's understanding that, for all practical purposes, the testimony of these witnesses is the crux of the case in support of the complaint.

To require A&P to proceed to examine these three witnesses, who are expected to establish the case against it, without first according A&P any opportunity whatever to prepare such an examination on the basis of full and adequate discovery would reduce this proceeding to a travesty.

Under the Commission's Rules and the Administrative Procedure Act, as amended, a litigant before this Commission is entitled to discovery of materials in the possession of the Commission or its staff which are likely to bear upon any aspect of the subject matter of the complaint about which witnesses offered by counsel supporting the complaint might be expected to testify. Since a primary basis for the order granted by the Hearing Examiner is the likelihood that these witnesses will testify only upon deposition - and not at an evidentiary hearing in ordinary course - discovery before the depositions commence is essential if A&P is to be accorded its right to conduct meaningful cross-examination.

The documents that A&P seeks from the Commission are all directly related to the subject matter of the testimony that counsel supporting the complaint have indicated will be given by the three witnesses in question. A&P is entitled under the Commission's Rules and applicable provisions of law to significantly wider discovery than asked in the present application, and it is hereby expressly reserving its right hereafter to apply for the additional, broader discovery to which the law entitles it. Nonetheless, and in order that this proceeding may go forward promptly, we have elected to limit the instant application to the bare minimum of essential documents without which A&P cannot be reasonably required to go forward with the cross-examination of what are expected to be critically important witnesses.

WHEREFORE, we respectfully request that the Hearing Examiner grant this application and enter an order issuing the subpoena duces tecum requested by A&P and vacating or modifying the order of November 8, 1971 as requested.

In view of the importance of this application to all further proceedings in this matter, A&P respectfully requests that oral argument be heard upon this application.

Respectfully submitted,

CAHILL, GORDON, SONNETT, REINDEL & OHL

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Dated: New York, New York
November 15, 1971

AUG 7 1972
SECRETARY

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of

THE GREAT ATLANTIC & PACIFIC
TEA COMPANY, INC.,
a corporation, and

BORDEN, INC.,
a corporation.

DOCKET NO. 8866

REQUEST FOR ADMISSION

Pursuant to Rule 3.31 of the Commission's Rules of Practice, it is hereby requested that Complaint Counsel admit the truth of the following matters relevant to this proceeding:

1. Raw milk is transported by tank truck to Borden's processing plant in Woodstock, Illinois seven days a week between the hours of 9:00 a.m. and 6:00 p.m. The tank trucks have a capacity of 1,800-3,200 gallons of raw milk and are operated by independent milk haulers. The drivers of the tank trucks are licensed by the State of Illinois, the State of Wisconsin, and the Chicago Board of Health as bulk tank haulers.

BORDEN REQUEST FOR ADMISSION

2. Raw milk was purchased for Borden's Woodstock, Illinois, plant during the 1964-1968 time period principally from the Pure Milk Association located at 343 S. Dearborn Avenue in Chicago, or its predecessor or successor organizations. Approximately 60% of such raw milk was produced on dairy farms in the State of Wisconsin, and approximately 40% in the State of Illinois.

3. At the farm the tank truck driver inspects the farmer-producer's raw milk for odors and appearance, checks the temperature, measures the volume of raw milk, agitates the raw milk for a specific period of minutes, draws samples of the raw milk for butterfat and bacteria tests, and pumps the raw milk into the tank on the truck. He rinses the farmer's bulk tank and leaves.

4. On arrival at Borden's plant the tank truck of raw milk is given a physical examination for odors and appearance, and the temperature of the raw milk is recorded. The driver of the tank truck delivers to Borden one sample of the raw milk of each farmer-producer for use in butterfat and bacteria tests which are conducted by Borden.

5. If the tank is accepted, raw milk is unloaded

into a silo storage tank. The milk is then pumped through a clarifier which sorts out impurities. The milk is then pumped through a plate cooler, cooled to 38°F. or below and then pumped into silo storage tanks of 10,000, 15,000 or 25,000 gallon capacities. The clarifier operates by centrifugal force, with the impurities or "sludge" sticking to the sides and the raw milk rising to the top.

6. In the holding tanks the raw milk is tested to determine volume, weight and butterfat content. Some of the raw milk is drawn from a holding tank through a separator which operates by centrifugal force. It separates the raw cream and the raw skim milk, with the raw cream rising through a tube in the center. The raw skim milk and the raw cream from the separator pass into separate tanks, to be used in standardizing the raw milk which will be processed into homogenized milk, and in the manufacture of by-products. Normally the butterfat content of the raw milk in the holding tanks is higher than desired, and is thus standardized "down" by pumping in raw skim milk. If the butterfat content is too low, raw cream is added from the tank holding the raw cream. After adding the desired amount of raw skim milk or raw cream, as the case may be, a sample is then taken and tested to determine if the de-

sired butterfat content has been reached.

7. When these holding tanks are standardized properly to comply with the Chicago Board of Health and state ordinances, and with Borden's Woodstock plant standards, the raw milk is then fortified. This is accomplished by adding Vitamin D emulsion (a Borden product known as "irradiated egosterol") at the rate of 1 cc per 200 qts., giving 400 U.S.P. units of Vitamin D per quart.

8. The raw product is now ready to be pasteurized. The heater section of the pasteurizer or "short time" is first heated with water in it to the temperature of 175°F. The raw product from the holding tanks then flows into a balance tank which controls the flow of milk through the "short time." The product then passes through the regenerative section, which has cold product from the balance tank flowing through one side of it and hot product from the heater section coming back through the other side. The generator section thus performs a double function of heating and cooling.

9. From the regenerator, the product goes into the heater section, where it is raised to a temperature of 175°F. From the heater it goes to a Creamery Package homogenizer, which is a high pressure pump that forces the pro-

duct through a very small orifice at pressures up to 2500 pounds per square inch. In this process the following physical changes in the product occur: (1) when the product is forced through this small orifice, the fat globules in the product are dispersed and stripped of the natural protein layer which normally surrounds the fat globules; (2) The average diameter of the fat globules is reduced from 10 microns to 2 microns, thus increasing the degree and stability of emulsification; (3) The curd tension of the product is reduced to a level of 20 grams, which makes the product more easily digestible.

10. After homogenization, the product passes into the holding tube, where it is held for a minimum of 16 seconds. This holding of the product for 16 seconds at 175°F. kills approximately 99.8% of the bacteria, which is a higher degree of pasteurization than required by ordinance and increases the shelf life of the milk. During the pasteurization the following changes in the product take place: (1) The enzymes normally present in the raw product are destroyed; (2) The bacterial population in the product is reduced to a point of bacteriological safety; (3) The carbon dioxide is expelled from the product, with the resulting decrease in the product's acidity; (4) The ascorbic acid and thiamin contents of the product are reduced; (5) The protein equilibrium

of the product is altered, facilitating the curd tension reduction previously described and reducing the coagulability of the resulting product. The destruction of enzymes and the reduction of the ascorbic acid and thiamin are definite chemical changes resulting from the pasteurization process.

11. From the holding tube, the product flows back through the other side of the regeneration section, thence to the cooler where the temperature is lowered to 38°F. The now pasteurized and homogenized milk is pumped from the cooler into silo storage tank of 10,000, 15,000 and 25,000 gallon capacities and held for packaging purposes.

12. Borden's Woodstock plant packages fluid milk and related products each day except Saturday and Sunday between the hours of 3:00 A.M. and 7:30 P.M.; this plant does not process or package on Saturday or Sunday. The milk is packaged in gallons, half gallons, quarts, pints, 10 ounce size and half pints in paper containers. The homogenized milk put into half-gallon containers with the A&P label was physically and chemically identical to that put into containers with Borden labels. The packaged milk leaves the filling room in cases, on an elevated type conveyor chain and is carried directly to the milk storage

room, where it is held at 38° to 44°F. until loaded on refrigerated delivery trucks and transport trucks. These trucks are loaded between the hours of 1:00 A.M. and 12:00 P.M. Some of the milk may remain in the milk storage room up to 48 hours.

13. Products other than homogenized milk are processed by the following additional steps:

Plain buttermilk - raw skim milk is pumped into the buttermilk processing machine which pasteurizes the product at 180° to 185°F. for thirty minutes. The product is then cooled until it reaches 72°F. It is then cultivated with lactic acid bacteria of approximately 1.5% and remains at 72°F. for twelve to fourteen hours. The product is checked for acidity and when the desired acidity is reached, the buttermilk is cooled to 40°F. It is then packaged.

Gail Borden - This product is processed exactly as homogenized milk except as to fortification. After standardization, a Vitamin A and D concentrate and Vitamin-mineral mixture in powder form is added at the rate of 1 gram per 10 quarts.

Fortified Skim Milk - Raw skim milk is standardized in the holding tanks at .5% butterfat. A liquid Vitamin A and D concentrate is added at the rate of 1 gram per 100 quarts.

The product is then pasteurized and packaged.

2% Low Fat Milk - Raw skim milk is standardized in the holding tanks at 2.0% butterfat. A liquid Vitamin A and D concentrate is added at the rate of 1 gram per 100 quarts. The product is then pasteurized and packaged.

Chocolate Milk - Raw milk is standardized in the holding tank at 3.45% butterfat. Chocolate powder and sugar are added, and the product goes through pasteurization at 180°F. and is packaged.

Chocolate Low Fat Milk - Skim milk is standardized in the holding tank at 1.0% butterfat. Chocolate powder and sugar are added, and the product goes through pasteurization at 180°F. and is packaged.

Half and Half - Standardized at 11.5% butterfat and 1.5% non-fat solids, pasteurized at 175°F., homogenized and packaged.

Cottage Cheese - The raw skim milk is pasteurized, and cooled to 40°F. and placed in the cheese vats. The product is then heated to 88°F. and cultivated with lactic acid bacteria of 4.0% and held at 88°F. for 3 1/2-4 1/2 hours. The product is checked for pH, and when the desired pH is reached, the product is cut with curd knives, gradually heated and gently stirred until it reaches a temperature of 124° to 138°F., depending on the pH, and the size of the curd at the time of cutting. The whey is then drained from the cheese and the cheese is washed with refrigerated sweet water. After the cheese has been throughly drained and cooled and a cream dressing with salt added, it is stored and then packaged.

Sour Cream - Raw cream is standardized to 18% butterfat and pasteurized in a vat at 180°F. for 30 minutes. It is cooled to 72° F. and cultured with 1.5% lactic-acid producing bacteria. It remains at 72°F. for 12-14 hours. The product is checked for acidity and when the desired acidity is reached, the sour cream is cooled to approximately 42°F. and it is then packaged.

Sour Cream Dip - Raw cream is standardized to 18% butterfat and pasteurized in a vat at 180°F. for 30 minutes. It is cooled to 72°F and cultured with 1.5% lastic-acid producing bacteria. It remains at 72°F. for 12-14 hours. The product is checked for acidity and when the desired acidity is reached, the sour cream is cooled to approximately 420°F. Then a mixture of dry French onion ingredients is mixed with the cooled sour cream. When it is thoroughly mixed, it is then packaged.

BORDEN REQUEST FOR ADMISSION

Submitted this 2nd day of August, 1972

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UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of

THE GREAT ATLANTIC & PACIFIC TEA
COMPANY, INC.,
a corporation, and
BORDEN, INC.,
a corporation.

DOCKET NO. 8866

8/23/72 BS
In Charge 9/5/72

Reply to Borden's Request For Admission

Complaint counsel have a number of objections to the form and propriety of the Request for Admission served upon them by respondent Borden on August 7, 1972. Respondent Borden has not set forth "Each matter of which an admission is requested . . . separately . . . ." [Rule 3.31(a)] Moreover, a great number of the statements contained therein are totally irrelevant to the issues of this case. Further, a number of the statements included within the request are a mixture of error, truths and half-truths. Finally, much of this data is peculiarly within the knowledge of respondent Borden and thus cannot be admitted or denied by complaint counsel without access to the Borden Company personnel who are privy to such information.

In order to underline these objections complaint counsel will briefly outline the obvious intent of said Request For Admission prior to their attempt to respond to some of the individual items of the request. In Foremost Dairies, Inc. v. Federal Trade Commission 348 F. 2d 674, 676-78, (5th Cir., 1965) cert. denied 382 U.S. 959, and a number of other decisions, more fully discussed below, it has been decided that milk flowing from farms in one state through a processing plant in a second state, for standardization, homogenization and pasteurization, and to the consumer or grocery stores in the second state ". . . undergoes a rather negligible processing, in general moving in a constant flow from the . . . dairy farms to meet the fairly predictable demands of the retail grocers . . . . This processing no more interrupts the flow of commerce than the temporary storage of the gasoline in the Standard Oil Case." (Foremost, supra p. 678).

The Request for Admissions cleverly mixes irrelevant data with errors, facts and half-facts in an attempt to imply that very substantial chemical and physical changes occur in milk as a result of processing at the Woodstock plant and that the milk comes to a prolonged stop for storage and processing at that plant, and that the "flow of commerce" is broken as the result of the described procedures. The result of this admixture is to give a highly misleading portrayal of the operations of Borden's Woodstock plant.

Objections

As to our basic objections to Borden's request, 4A *Moore's Federal Practice*, Sec. 36.05, dealing with Federal Rule 36, which is analogous to Commission's Rule 3.31, states that the "facts should be stated singly, so that the party called upon to make answers need not write an essay in reply." Further, it notes that the request for admission "should not state a 'half a fact' requiring that the answering party append a statement qualifying its answer. This is important without regard to the fact that the *requests may be stricken on objection* (emphasis added), for hedged and prolix questions do not eliminate the necessity of proof at trial and ordinarily simply reinforce the conclusion that the matters are fairly controversial."

Further, it is manifestly improper to request admission of facts which are peculiarly within the knowledge of the requesting party, especially where the requesting party is a party respondent. 20 ALR 3rd 759. After all, complaint counsel not only do not have access to Borden personnel, but we can hardly expect fair and impartial advice from the opposing party requesting the admissions. This is notably obvious in this pleading.

Finally, Rule 3.31 clearly limits requests for admissions to facts or applications of law to facts which are *relevant* to the issues of the case. Many of the alleged facts stated by Borden are clearly irrelevant to the issues of this case.

On these bases we object to the entire request of respondent Borden. On the other hand, where our objection rests solely on the failure to state each fact singly, complaint counsel have attempted to admit or deny the individual requests of respondent. The numbered paragraphs below correspond to those in Borden"s request.

COMPLAINT COUNSEL REPLY TO ADMISSION REQUEST

Borden's Statements

1. Complaint counsel admit that raw milk is transported by truck to Borden's Woodstock processing plant seven days a week and that the trucks are operated by independent milk haulers.

We object to the rest of this statement dealing with the exact hours of delivery, truck capacity, and the nature of licensing involved, as being irrelevant to the issues of this case. Moreover most of such facts are peculiarly within the knowledge of Borden and, therefore, its requested admissions are objectionable on this ground also.

2. Complaint counsel admit the statements in this paragraph. It should be noted, however, that another source of raw milk for Borden's Woodstock, Illinois plant was intra-company shipments of raw milk from other of Borden's own plants located in the State of Wisconsin. Partial records of such shipments show that in at least one month, October 1966, such shipments represented about 20% of the raw milk supply for the Woodstock plant. Substantial of such shipments are also shown for most months for which Borden was able to supply records of these shipments to complaint counsel. At the time of the subpoena return by Borden it was stated that there were undoubtedly other of such records, but they could not be located. The testimony indicated, however, that this was an important element of Borden's raw milk supply for its Woodstock plant.

3 and 4. We object to these statements as irrelevant to the issues of this case.

5. We object to this statement as irrelevant to the issues of the case. Also, we object on the grounds that the exact procedures followed, as stated herein, are peculiarly within the knowledge of respondent Borden.

All that could be ascertained by complaint counsel is that in normal procedures at a milk processing plant, raw milk which is received is clarified in a mechanical clarifier, using centrifugal force, with impurities or "sludge" being removed, and that the milk is cooled to 38° F or below and stored temporarily while awaiting processing.

6. Complaint counsel admit the statements in this paragraph. It should be pointed out, however, that the separating process, through which some of this milk is put, is strictly a mechanical process which separates cream and skim milk. The testing and standardization mentioned in this paragraph is necessary in order to insure that the packaged milk processed at this plant meets minimum butterfat standards required by law.

7. Complaint counsel object to this statement as irrelevant to the issues of this case. Moreover, the exact amount of Vitamin D emulsion added and the alleged fact it is a Borden product are items of knowledge peculiar to respondent Borden and are not a proper subject for admission.

Insofar as the relevancy question is concerned, the addition of such a small amount of Vitamin D to this milk, no more changes the product from milk to some other product, than does the addition of fluoride compounds to water change that basic commodity to some other product.

8. Complaint counsel object to this paragraph on the grounds that it mixes information peculiar to the knowledge of respondent Borden with a description of the pasteurization process.

The temperature mentioned by Borden is slightly above the minimum required by law, as noted in paragraph 10 of the Request for Admissions. Such allegation is peculiar to the knowledge of Borden personnel and is not the proper subject of a request for admissions.

Moreover, much of the detailed description of this process is irrelevant to the issues of this case.

Complaint counsel have been informed that pasteurization is a process which involves the momentary heating of the raw milk and its cooling in order to destroy undesirable bacteria.

9. Complaint counsel object to this paragraph as a mixture of information known solely to respondent Borden, with facts and half-facts.

Homogenization is a mechanical process in which the milk is forced under heavy pressure through tiny openings. This breaks up the fat globules in the milk into smaller fat globules. The resulting smaller fat globules will not rise to the top of the milk, but remain evenly distributed throughout the milk. This is the purpose of homogenization, that is, to prevent the rising of cream to the top of milk.

As for the temperature stated herein and the amount of pressure at the small orifices, these are variables known only to Borden.

The various physical changes stated in this paragraph are only partially true and vastly over-rated. Complaint counsel are informed that the protein membrane surrounding the fat globules is broken in the process of breaking up the fat globules, but undoubtedly closes up around the new smaller globules. In any event any protein content, even if "stripped away," is not lost or destroyed in the process of homogenization, but remains in the milk.

The reduction in the average diameter of the fat globules is approximately correct, as stated by respondent.

As for the reduction in curd tension, there is a slight reduction and this does add slightly to the digestibility of milk. However, it does not bring about any real nutritional change in the milk.

10. Complaint counsel again object to this statement as a mixture of facts known peculiarly to Borden, error, facts and half-facts. The sum total of this statement is to give the impression that pasteurization causes basic chemical and physical changes in milk which alter its taste, appearance and/or nutritional value. Such implication is totally false.

The temperature and time set out in this paragraph are items of information peculiar to the knowledge of respondent Borden. If Borden does heat the milk to 175 degrees for 16 seconds, this would add to the shelf life of the milk.

Pasteurization is a process which involves the heating and cooling of milk to destroy undesirable bacteria. Of course, if the raw milk comes from a healthy cow and is not contaminated during or after milking of the cow, such bacteria should not be present in the milk in the first place. Due to the commonness of such contamination the laws of every state now require pasteurization for the destruction of pathogenic bacteria.

As for the individual changes claimed by respondent Borden:

All enzymes present in raw milk are not destroyed in pasteurization. However, some are. In any event this is an insigificant change in the milk insofar as any nutritional effect is concerned.

As for the reduction in bacterial population, this is the purpose of pasteurization. Harmful bacteria are destroyed. As noted above, however, these shouldn't be present in the milk in the first place.

The expulsion of some carbon dioxide from milk during pasteurization is an insignificant factor. This reaction occurs when any liquid is warmed. The reduction in acidity is not even measurable according to complaint counsel's informants.

The alleged reduction in ascorbic acid and thiamin, is an error, or a half-fact at the very best. United States Department of Agriculture Handbook No. 8, Composition of Foods, Raw, Processed, Prepared, p. 39, lists the ascorbic acid and thiamin content of raw milk as exactly the same as that in processed milk -- .03 mg. per 100 gm. for thiamin and 1 mg. per 100 gm. for ascorbic acid. In any event both are merely trace elements of milk. Milk is not considered as a source of these vitamins in either the raw or processed states. Our informants tell us that if there is a reduction in these two vitamins: (a) it is not significant nutritionally, and (b) it may be due more to exposure to light than to the momentary heating of milk during pasteurization. Further, it was particularly noted by one informant that there would be a more noticeable variation in the presence of these compounds in raw milk, as between cow to cow, or even comparing the same cow at different seasons, than as between raw and pasteurized milk.

Finally, as to the protein equilibrium, complaint counsel have ascertained that there is absolutely no difference in the protein content of milk before and after processing. As stated above there is some reduction in curd tension, primarily resulting from homogenization.

The last sentence of this prolonged and technically involved paragraph implies that major chemical changes result in milk from pasteurization. As noted above this is false. Moreover, complaint counsel's informants, from the United States Department of Agriculture and the Food and Drug Administration, report that the processing of milk works no significant changes in the raw product from the standpoint of nutrition, appearance, or flavor.

11. Complaint counsel object to this paragraph as irrelevant to the issues of this case. Further, it is objectionable because some of the allegations contained therein are peculiar to the knowledge of respondent Borden. Moreover, any storage of the product after pasteurization is, of necessity, temporary in nature.

12. Complaint counsel object to all but the second and third sentences of this long statement on the grounds that the exact details stated therein are peculiar to the knowledge of Borden. Moreover, the statement of operations appears to describe present-day operations at the Woodstock plant, rather than the time periods involved in this case.

Complaint counsel admit that respondent Borden packages milk in gallons, half-gallons, quarts, pints, 10 ounce size and half pints in paper containers. We also admit that the homogenized milk put into half-gallon containers, as well as other sized containers, with the A&P label was physically and chemically identical to that put into containers with Borden labels.

Moreover, all other milk and dairy products packaged by Borden under A&P label were physically and chemically identical to the same products packaged under Borden labels.

13. Complaint counsel admit the statements contained in this prolonged section, with the exception of the second subparagraph dealing with "Gail Borden." The exact amount of vitamin additives put in this product by respondent Borden is a matter peculiar to Borden's own knowledge. Therefore, this statement is objectionable and should be stricken, as should similar allegations peculiar to Borden's knowledge, as noted above.

Various Implications of Prolonged Storage of Product

Throughout respondent Borden's Request for Admission, there are various statements implying prolonged delays or storage of product after the raw milk is received at the plant and before delivery on the various routes out of the Woodstock plant. According to complaint counsel's informants such implications of prolonged storage and stoppage on the way from the farm to the store or consumer are very misleading.

Milk in the raw or processed state is still a perishable commodity. Even after processing, it begins to change in flavor, for the worse, if stored too long. It may be true that processed milk has a longer shelf life today than several decades ago (even raw milk is purer and longer lasting than during that era), but it is still perishable. Any dairy operation moves the raw milk through its plant and the processed milk out of its cold room, or storage room, and onto the market as quickly and regularly as practicable. Differences in the number of days raw milk is delivered and the number of days the processing plant packages and ships necessarily result in some temporary storage, as do temporary breakdowns in equipment and work schedules. However, all stoppages are definitely temporary in nature. More so than that involved in Standard Oil Co. v. Federal Trade Commission, 340 U.S. 231, 71 S. Ct. 240 (1951).

Moreover, it is complaint counsel's information and belief that Borden's Woodstock operation ran on a 6-day week basis in 1965 and for some time thereafter. If so, this would further lessen any delay during the time period most relevant to the issues of this case.

The Commerce Issue Raised by this Pleading

In *Foremost Dairies, Inc.* v. *Federal Trade Commission*, *supra*, the record revealed that 20% of the raw milk supply for Foremost's Santa Fe, New Mexico processing plant was produced on dairy farms in the state of Colorado. The raw milk was purchased from associations of dairymen and shipped to the Santa Fe plant. There it was standarized, pasteurized and some was homogenized. The sales in question in that case were all within New Mexico; in Albuquerque. (*Supra*, at p. 676). The Court held that "In the case before us, the fluid milk undergoes a rather negligible processing, in general moving in a constant flow from the Colorado dairy farms to meet the fairly predictable demands of the retail grocers in Albuquerque." (*Supra*, p. 678). The Court found the sales to be "in commerce," even though the milk was processed in New Mexico and the sales in question all occurred in New Mexico. It cited the following "stream of commerce" cases in support: *Standard Oil Co.* v. *Federal Trade Commission*, 340 U.S. 231, 71 S. Ct. 240 (1951). *Universal Milk Bottle Service* v. *United States*, 188 F. 2d. 959 (6th Cir. 1951); *Pevely Dairy Co.* v. *United States*, 178 F. 2d. 363 (8th Cir. 1949).

Again in *Dean Milk Co.* v. *Federal Trade Commission*, 395 F. 2d. 696, 714-15 (7th Cir. 1968) this same question was gone into in some detail. In one of the Dean plants involved therein, the Louisville, Kentucky plant, the raw milk supply was purchased from a producer-cooperative located in Louisville. The cooperative obtained the milk from its producer-members whose farms were located within a 70 mile radius of Louisville. Some of these dairy farmers were located in Indiana. Approximately 25% of the raw milk supply for the Louisville plant originated on Indiana farms. (*Supra*, p. 715). The Court stated: "Irrespective of whether the cooperative served as a conduit for the sale of milk of its Indiana members or as the agent of Dean in acquiring milk, we believe that 25 percent of the milk processed in Dean's Louisville plant was passing in a continuous flow from Indiana farms. Consequently, we agree with the Commission that the in commerce requirement was satisfied with respect to the secondary level case in Louisville." (Supra, p. 715). 1/ This matter also involved milk which was standardized, pasteurized and homogenized. See 68 FTC 780, the Commission decision thereir.

As a result of this well-established line of cases, complaint counsel are prepared to prove and Borden has admitted by its pleading that at least 60% of the raw milk supply for its Woodstock plant originated in the state of Wisconsin. We had not anticipated at this late date, however, that Borden would try to establish milk as a manufactured product rather than one that goes through a rather negligible processing, nor that it would claim or imply prolonged stoppage of the product flow at this plant in Woodstock.

Complaint counsel will shortly prepare a request for admissions for service upon Borden which will hopefully resolve these issues. However, if necessary, complaint counsel reserve the right to claim "surprise" if these apparently well-settled principles are challenged and in that case, will have to call witnesses either during their case-in-chief or in rebuttal, to set the record straight on these matters.

Respectfully submitted,

John J. Mathias
John J. Mathias,
Edwin R. Soeffing
Edwin R. Soeffing,
By John J. Mathias
Andrew G. Stone,
Counsel Supporting
the Complaint.

BC/JJMathias/ERSoeffing/AGStone/sda.

1/ See also, Burke v. Ford, 377 F. 2d. 901, 905 (10th Cir. 1967); United States v. Sheffield Farms Co., 43 F. Supp. 1, 5 (D.C. S.D. N.Y. 1942); Beatrice Foods Co. et al., F.T.C. Dkt. 8663.

Subscribed and sworn to before me, a duly authorized Notary Public, by John J. Mathias, of counsel supporting the complaint, as true and factual to the best of his information and belief, this 17th day of August, 1972.

Frances Pileggi
Notary Public

My Commission Expires Dec. 14, 1973
for the District of Columbia

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FEDERAL TRADE COMMISSION
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UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of

THE GREAT ATLANTIC & PACIFIC TEA
COMPANY, INC.,
a corporation, and
BORDEN, INC.,
a corporation.

DOCKET NO. 8866

TO THE HONORABLE THEODOR P. von BRAND, ADMINISTRATIVE LAW JUDGE:

Answer in Opposition to Respondent A&P's Motion to Dismiss the Complaint and For Related Relief.

By motion filed on October 13, 1972, respondent A&P requests the dismissal of the complaint herein on two bases: (1) Undue delay by Commission Counsel at the investigational stage of this matter, which delay has allegedly prejudiced respondent's rights herein; and (2) Discontinuance of the contract between Borden and A&P in February 1972. 1/ In addition respondent A&P requests that the hearing scheduled for November 20, 1972 be cancelled on the basis that an affirmative ruling on its motion in whole or in part would eliminate the need for such hearing or substantially alter its scope. In the alternative it asks for postponement of the November 20th hearing date, so that it can prepare for cross-examination of complaint counsel's witnesses.

1/ Four months after issuance of complaint herein and nine months after receipt of the notice complaint.

COMPLAINT COUNSEL ANSWER TO A&P MOTION

Complaint counsel hereby oppose respondent's motion *in toto*, both on its factual and legal bases. 2/ Moreover, complaint counsel are astonished by the position taken by respondent herein, in view of tha actual history of events as they occurred in the investigational stage of this case. It is true that there were delays during the course of the investigation but it is also quite apparent that there were two very basic causes of such delays: (1) Respondent A&P; and (2) Respondent Borden. Complaint counsel are absolutely amazed that respondent would now even attempt to cite these delays for which it and its co-respondent are responsible as a basis for dismissal of the complaint.

Furthermore the evidence herein strongly contradicts A&P's argument that respondent's rights have been prejudiced. The depositions to preserve the testimony of witnesses Minkler, Tarr and Malone, as well as a contemporary memorandum of one of Borden's negotiators, Mr. Malone, indicate that both A&P and Borden were aware, in September, 1965, two months prior to the beginning of service under the contract herein, that their private label arrangement was fraught with legal peril and could be expected to be investigated by one or more legal authorities, from an antitrust viewpoint. (Minkler and Tarr Depositions, Tr. 219-21, 472; CXID 63 A-D). Moreover, a Justice Department investigation was initiated during the year 1966. Respondents hve thus had early and continuing notice that their actions would someday have to be defended in an antitrust action.

Moreover, discontinuance of an act without substantial reason to believe that the *practices* alleged in the complaint *cannot* or *will not* be resumed in the same or similar manner (especially where the discontinuance occurs after issuance of the complaint) has long been held *not* to be a basis for dismissal of a complaint.

2/ It should be noted that complaint counsel's time for answering respondent's motion has been cut in half to only 5 days (See Order of the Administrative Law Judge, dated October 16, 1972). Although, we agree with the wisdom of this order it should be noted that respondent's motion is 31 pages long and accompanied by 3 affidavits totalling an additional 49 pages. Under the circumstances, the response herein must be limited to the major issues only. We will attempt to also answer some of the more egregious misstatements made therein on collateral issues. However, our failure to respond to each and every one of these minor collateral issues at this time, should not be interpreted as agreement with such statements and conclusions. Complaint counsel will rely on the pretrial record herein and the facts of the case to refute these other matters.

History of the Investigation:

Respondent A&P and Borden entered into a private label supply agreement covering milk and other dairy products for A&P's Chicago Unit (which covered a multi-state market area) in October 1965. Service commenced under the contract on November 1, 1965. The relationship continued until February 26, 1972, *some four months after issuance of complaint herein*. (See affidavit of Denis McInerney in support of present motion, p. 8).

In 1966 the Department of Justice initiated an investigation into this agreement to determine whether it involved a violation of its order against Borden, obtained in the case underlying *United States* v. *Borden Co.*, 370 U.S. 460 (1962). The latter case involved prior price discriminations by Borden in favor of A&P, as well as Jewel Tea Company stores. At the end of 1966, the investigation was referred to the Federal Trade Commission and the matter was assigned to the Chicago field office for investigation. Attorney-Examiner Richard A. Palewicz was then assigned to investigate the case. In mid-February 1967 Mr. Palewicz contacted both A&P and Borden requesting certain data and supporting interviews with knowledgeable company personnel. The delaying tactics of respondents commenced immediately.

From this point on, Commission counsel, primarily Mr. Palewicz alone until January 1970, pushed strenuously for an expeditious and thorough investigation of this matter and, once it appeared that there was reason to believe violations of the anti-trust laws had occurred, for complaint and hearings in this matter. However, throughout these proceeding respondents have found ways to delay by inches, yards and miles, so that this matter has been strung out as far as their tactics would allow. (See affidavits attached).

It took more than a year to obtain any meaningful response from even one of the respondents (Borden) and the investigator finally had to seek *subpoenas duces tecum* and *ad testificandum* to obtain the cooperation of A&P. Due to these delays and the natural complexities of a Robinson-Patman investigation, in which reams of invoicing and other pricing records must be reviewed, the field investigation was not completed until early 1970. Once the file reached headquarters it had to be reviewed and brought up to date through an additional subpoena addressed to respondent Borden. Again it took some months after the subpoena return to obtain from respondent all of the documentation asked for and necessary for a calculation of the rebates to certain customers. The investigation and analyses of the file were handled as expeditiously as possible under these circumstances.

Respondents now seek to profit from such delaying tactics by the expedient of alleging that delays in bringing suit herein have prejudiced their rights to a fair hearing. This obviously is not a valid argument.

Prolonged Investigations in Antitrust Cases are Not Unusual:

First of all, it is far from unusual for investigations in complex antitrust matters to require several years, or even as much as a decade to complete. Robinson-Patman cases, because of the large volumes of documentation involved, frequently take several years for the gathering of all necessary documentary evidence.

Respondent also ignores the compelling precedent that laches or delay is no defense in a suit by the government to vindicate a public right, such as exists in an antitrust action like the present case. United States v. Pennsalt Chemicals Corporation, et al., 262 F. Supp. 101 (E.D. Pa. 1967). See also, Federal Trade Commission v. Texaco, Inc., 381 U.S. 739 (1965); United States v. California, 332 U.S. 19, 39-40 (1947); Federal Trade Commission v. Algoma Co., 291 U.S. 67, 80 (1934); and United States v. DuPont & Co., 353 U.S. 586, 590 (1956). This principle and the fact that respondents themselves caused any undue delay existing in the investigation of the present matter are conclusive reasons why the present motion should be dismissed. Federal Trade Commission v. J. Weingarten Inc., 336 F.2d. 687 (5th Cir. 1964).

Cases Cited by Respondent Do Not Support Its Position

Even the cases cited by respondents do not support their contentions that prolonged investigations in antitrust cases are grounds for dismissal. The cases cited are all either criminal cases 3/ or involve Commission matters in which there were prolonged delays following issuance of the complaint and before hearings. 4/ The criminal matters present a special constitutional problem under the Sixth Amendment and are obviously distinguishable from the present case. However, even in these cases respondent's arguments are not upheld.

In Powell v. United States, 352 F.2d 705 (D.C. Cir. 1965) the Court held that the defendant, in a criminal case rather than the prosecution, bears the burden of proving: (1) that there had been no legitimate reason for the delay and (2) that he had been prejudiced by the delay. In that case, defendant was able to show a deliberate delay following the establishment of a case against him and the time of arrest. However, the Court ruled that the state had a legitimate reason for delay; the protection of undercover agents. Therefore, defendant's appeal was denied. Under the ruling of that case, respondent's present motion is clearly defective in that it has not shown that complaint counsel were responsible for any delay, nor that any possible delay was not based on legitimate reasons nor even that it has suffered prejudice (See discussion below).

In United States v. Parrott, 248 F. Supp. 196 (D.C.D.C. 1965), also a criminal case, it was shown that the government had "made a deliberate choice to hold the criminal prosecution in abeyance." (Supra, at p. 203). There was also a prior civil action in which numerous depositions were taken of defendants and during which the government had specifically noted

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3/ United States v. Parrott, 248 F. Supp. 196 (D.C. D.C. 1965); Dickey v. Florida, 398 U.S. 30, 37 (1970); and Powell v. United States, 352 F.2d. 705 (D.C. Cir. 1965).

4/ American Bakeries Co., 68 FTC 8 (1965) ; Harney County Land Development Corp., FTC Dkt 8568; Great Southwestern Land Co., Inc., FTC Dkt. 8562. All of these matters were dismissed for non-prosecution when several years had passed following issuance of the complaint and the matters still had not been brought to trial.

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that no criminal charges were pending. Defendants were not notified of the threat of criminal proceedings and did not avail themselves of injunctive proceedings to prevent civil proceedings until after trial of the criminal case. (*Supra*, at pp. 198-99).The court in considering delay under such circumstances used four factors to determine whether defendants were denied a "speedy trial": (1) the time involved; (2) who caused the delay; (3) the *"purposeful aspect of the delay"*; and (4) prejudice to the defendant. (*Supra*, at p. 202) (Emphasis added). Again A&P's contentions will not bear up under these criteria. 5/

Of course, the strict procedural principles of criminal law cannot be engrafted into the field of administrative law in any event. *Genuine Parts Company* v. *Federal Trade Commission*, 445 F.2d. 1582, 1387 (1971).

In the Commission matters cited dealing with delay, dismissal was on the grounds that complaint counsel had failed to prosecute their cases in a timely manner, *after complaint had been issued*. None of these cited cases dismissed the complaint on the grounds that the investigation had covered a several years' span. Indeed, as noted above most antitrust cases are rather prolonged at the investigative stage.

Insofar as a "speedy trial" is concerned, which is the issue raised in most of the cases cited by respondent A&P, A&P clearly admits that complaint counsel have pushed very hard for an expeditious hearing in the instant case. (Motion to Dismiss, p. 10). Complaint counsel would add that every effort was also made at the investigative stage to proceed just as expeditiously, though, as noted above, those efforts were frequently hampered by the delaying tactics of respondents.

It is well settled that respondent cannot pull itself up by the bootstraps of its own dilatory behavior. *Finton* v. *Lane*. 356 F2d 850, 853 (7th Cir. 1960). *Federal Trade Commission* v. *J. Weingarten, Inc.*, 336 F.2d 687, 691 (5th Cir. 1964).

5/ The third criminal case cited by respondent A&P, *Dickey* v. *Florida*, 398 U.S. 30, 37 (1970) obviously bear no relationship to the instant case. There, a delay of 8 years *following the arrest* and before trial resulted in dismissal of the case.

Respondents Have Not Been Prejudiced

Respondents have known since prior to the beginning of service under their agreement that antitrust action would most likely result therefore. As noted above, the deposition testimony of Messrs. Minkler and Tarr, as well as a contemporary memorandum of another Borden official (copy attached-Attachment III) reveal that both A&P and Borden were aware, even before service began under their contract, that their private label agreement would probably result in litigation. They have also been quite aware that their relationship was under close study for possible antitrust violations, since the Justice Department began its investigation back in 1966.

Although a few potential witnesses may have died, this could happen no matter how soon complaint was brought in this matter. Moreover, A&P has made no showing of prejudice resulting therefrom. One of the persons named by A&P as now being deceased, the accountant for Bowman Dairy (Mr. Parmalee), was alive and interviewed by respondent A&P following issuance of the complaint. (McInerney affidavit, p. 13). Complaint counsel assume that if Mr. Parmalee's testimony was essential to or helpful to A&P's defense, A&P would have followed complaint counsel's example and immediately requested a deposition to preserve evidence.

In view of A&P's present allegations, complaint counsel now note that the deceased potential witness mentioned in connection with their depositions to preserve evidence was a Mr. Fred Nonnamaker, former Executive Secretary of Associated Milk Dealers, Inc., a trade association of milk processors and distributors in the Chicago area. 6/ Mr. Nonnamaker testified in the Dean-Bowman case, Dkt 8674, to the effect that Bowman's relationship with A&P was such that it could not expect to obtain any A&P business under any circumstances. (Dkt 8674, Tr. 2207-08). If Mr. Nonnamaker could have reiterated this statement and given substantiating testimony as to why this was so, it would have indicated that the Bowman offer to A&P in 1965 was only a "straw man" which A&P used to whipsaw Borden into a lower, discriminatory offer. The loss of such testimony was certainly not harmful to respondent A&P's defense.

6/ Complaint counsel were informed at that time that Mr. Nonnamaker was a former Bowman employee.

Leaving aside for the moment the fact that respondents caused any delay herein, respondents must prove that actual prejudice has resulted from unjustifiable delay, rather than just that a few witnesses, or some types of documentation are no longer available to them. Powell v. United States, 352 F.2d 705, 708 (D.C. Cir. 1965); Federal Trade Commission v. J. Weingarten, Inc., supra, at 691-92. Respondents have not carried that burden in this matter. The unavailability of a few, out of a whole host of industry witnesses and the unavailability of some records subpoenaed by respondents does not indicate prejudice. For instance, many retail price records probably have been unavailable since a few weeks after the Borden A & P contract began, since the evidence indicates retail prices rose at that time and many retailers destroy such records as soon as they are outdated. (See, e.g., Spear affidavit pp. 4 and 6, re retail sales records of Tittle and Wilco stores.) Under A & P's logic, as long as these, or any type of documentation desired by respondents was unavailable, complaint could not have been brought even at that time. Such an argument is obviously fallacious. Powell v. United States, supra; Federal Trade Commission v. J. Weingarten, Inc., 336 F.2d 687, 691-92 (5th Cir., 1964).

In view of these facts, respondent's arguments of prejudice and lack of due process just will not stand up.

Respondent's Allegations of Novelty Are Baseless As Noted In Prior Pleadings

First of all, A & P has once again misstated the record in connection with the allegations of the various counts of the complaint. It interprets Count I as requiring that a buyer advise its supplier of the terms of a competing bid (McInerny affidavit, p. 4). Complaint counsel have repeatedly pointed out that Count I would only require A & P, under the circumstances alleged in the complaint, to inform Borden that it could not accept the offer of Borden on the basis offered; that is, meeting competition. 7/ The charges of Count I are most certainly not novel and are well within the limits defined in precedent cases, as noted in prior briefs. Moreover, they are well within the bounds of the notice of investigation given to A & P in the original letter from Mr. Palewicz requesting information, in February 1967, wherein it was noted that A & P was under investigation in connection with its agreement with Borden, not only for a possible violation of Section 2(f), but also for a possible violation of Section 5 of the Federal Trade Commission Act "for engaging in unfair methods of competition, or deceptive acts or practices to procure a violation of Section 2(a) of the Clayton Act, as amended." 8/

7/ Complaint counsel's prior pleadings on this point outline in some detail the deceptive nature of A & P's conduct of its negotiations with Borden, as alleged in the complaint, and the manner in which the practice of A & P in this instance frustrates the policy of Section 2 of the Clayton Act, as alleged in the complaint.

8/ All of the witnesses who could testify concerning the factual basis for Count I, as well as the documentary evidence relating thereto, were all still available at the time of complaint.

As to Count II of the complaint, there is certainly nothing novel in the allegations of a violation of Section 2(f) therein. Respondent again misstates the record in alleging that complaint counsel contend "that in this case A & P alone has the burden of proving any cost justification or meeting competition defense." (A & P Motion, p. 12). Complaint counsel have at all times herein admitted that they have the burden of showing that A & P knew or should have known that the discriminations in its favor could not be cost justified. The Kroger Co. v. Federal Trade Commission, 438 F.2d 1372 (6th Cir. 1971) cert. denied, 404 U.S. 871 (1971). We still stand ready and able to prove such to be the fact. 9/

It is also important to note that Borden has not been absolved of any wrongdoing in its dealings with A & P, in violation of the Robinson-Patman Act, as alleged by A & P on page 12 of its present Motion. Indeed, respondent Borden has been on notice that they were under investigation for a possible violation of Section 2(a) of the amended Clayton Act since 1966 when the Justice Department investigation began. 10/ It is therefore, to be expected that it preserved or prepared whatever evidence that was available to it to defend itself against such a potential charge.

Finally, there is nothing novel in the allegations of Count III of the complaint. A & P omits material allegations of the complaint in describing this Count on pages 17 and 18 of its motion. The basic charge of Count III is that A & P and Borden entered into a "combination...

9/ Insofar as the meeting competition defense is concerned, the complaint and evidence herein indicate that the competition being "met" by Borden was a competitive offer from Bowman Dairy to A & P. A & P was in the best position to prove such defense if it existed. However, complaint counsel are prepared to prove that the Borden bid substantially "beat" the Bowman offer. Under these circumstances, A & P's later citation to the Sun Oil and Bargain Car Wash cases are certainly not in point.

10/ It is still possible that an action could be brought by either the Justice Department or the Commission, charging such a violation, if the public interest should require such action.

which had the tendency or effect of stabilizing and maintaining prices...." The "course of conduct" referred to therein consists of the conduct of both of the parties during the course of their negotiations and dealings which gave rise to and constituted that "combination."

As noted in complaint counsel's earlier statement in clarification of this Count, filed January 28, 1972, at page 2 thereof:

> "This is a simple Sherman Act violation. The course of conduct involved here, while unusual in that it also resulted in a discriminatory pricing agreement, is a classic example of how firms in concentrated markets may combine and engage in illegal price tampering. Each of the two companies, knowing that under prevailing market conditions either could disrupt prices, acted in a way which assured the other company that it would not do so. The concerted action of these two companies tended to stabilize or maintain prices for milk and dairy products in the Chicago market area and was, therefore, a violation of Section 1 of the Sherman Act [and Section 5 of the Federal Trade Commission Act]. United States v. Container Corp. 393 U.S. 333, 335-37 (1969); Albrecht v. Herald Co., 390 U.S. 145 (1968).

Although this charge was not specifically investigated at the field investigation stage of these proceedings, the review of the evidence preparatory to recommendation for complaint herein revealed reason to believe that such violation occurred. Accordingly, the charge was included in the complaint. Notice was given to respondents of such charge as soon as possible upon this analysis. That was in the Notice Complaint and ~~Order~~ mailed to respondents on May 28, 1972.

In view of the extreme seriousness of the nature of such charges (price stabilizing and fixing have always been considered among the most serious of all possible antitrust violations), the evidence of such violation could not be ignored, merely because it had not become apparent until the review of the file was made at the end of the regular investigation. Moreover, both A & P and Borden were on adequate notice that their association and dealings were under close scrutiny. Under the circumstances revealed in this case they were on adequate notice that their agreement and combination might be the subject of such charges.

Again respondents have not been prejudiced by the filing of the complaint since the thrust of this Count lies with the behavior of respondents and the conduct of their negotiations and dealings, as well as their later pricing behavior. The witnesses involved of both respondents are all still alive and available. Further, sufficient evidence appears available both to respondents and complaint counsel concerning the general market conditions under which this combination took place. There are many knowledgeable retailers and dairymen available to testify concerning market conditions and market leadership. Sales documentation is also available, even if not in the form subpoenaed by respondents. 11/ There is no persuasive showing by respondents that their rights have been prejudiced with relation to Count III either on the basis of "novelty" or because of alleged "delay."

Discontinuance Is Not A Ground For Dismissal In This Case

A & P asserts that its relationship with Borden terminated on February 26, 1972 (McInerny affidavit, p. 8) and cites this discontinuance as grounds for dismissal. First of all, this so-called discontinuance occurred four months

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11/ In addition complaint counsel have voluntarily opened their files to respondents in this regard, including the files of the Commission's Milk and Bread Price Survey of 1966 and the public record in the Dean-Bowman case, supra.

after the issuance of complaint herein and nine months after service of Letter A from the Commission with the notice complaint and order. Secondly, A & P has not alleged a discontinuance of the *practices* alleged in the complaint, it has merely stated a discontinuance of its relationship with respondent Borden and gives as its reason, the receipt of better offers from competitors of Borden. There is nothing in either this assertion or this record which would indicate that the public interest would be protected if complaint were dismissed. Under these circumstances, the authorities are uniform in holding that dismissal of the complaint is not warranted. See for example, *Guziak v. Federal Trade Commission*, 361 F.2d. 700 (8th Cir. 1966); *Clinton Watch Co. v. Federal Trade Commission*, 291 F.2d. 838 (7th Cir. 1961), *cert. denied* 368 U.S. 952 (1961); *Marlene's Inc. v. Federal Trade Commission*, 216 F.2d. 556 (7th Cir. 1954); *Eugene Dietzgen Co. v. Federal Trade Commission*, 142 F.2d 321 (7th Cir. 1943), *cert. denied* 323 U.S. 730 (1944); *Coro, Inc. v. Federal Trade Commission*, 338 F.2d 149 (1st Cir. 1964), *cert. denied* 380 U.S. 954 (1965); *Giant Foods. Inc. v. Federal Trade Commission*, 322 F.2d 977 (D.C. Cir. 1963).

A & P's Request For Cancellation Or Postponement Of The Hearing Date

Respondent's motion for cancellation or continuance is based primarily on the merits of its motion to dismiss. (Motion, pp. 24 and 25). This basis has been adequately discredited above. It provides no reason for either cancellation or postponement of the scheduled hearings.

Respondent also notes the need for time to interview witnesses which complaint counsel intend to call. (Motion p. 25). Complaint counsel turned over their witness list to respondents on May 31, 1972, approximately five months ago, and there have been only a few timely changes made since that time. We know that respondent has been interviewing these witnesses, since complaint counsel were requested to help persuade one witness to talk to A & P counsel. We complied with that request. It is also clear that A & P has hired additional counsel for the specific purpose of interviewing these witnesses and that many have already been interviewed. (Affidavit of Bruce A. Spear in support of Respondent's Motion). Under these circumstances any further delay in these proceedings is definitely not warranted. 12/

Some Miscellaneous Collateral Issues Raised By A & P's Motion and Affidavits

1. A & P asserts that some of the proposed witnesses for complaint counsel have refused to see A & P counsel. (Motion, p. 12) Postponement of the hearing date would most certainly not cure this problem. The witnesses have the right to refuse to talk to respondent's counsel, if they so desire. Complaint counsel have attempted to assist A & P in obtaining an interview in the one instance reported to them. (Letter to Mr. Edward Barney, October 6, 1972).

2. A & P counsel asserts that most of its time since issuance of the complaint has "been taken in responding to requests for information from complaint counsel--including a voluminous request for admissions in the last few weeks." (Motion, p. 27). The pre-trial record clearly shows that complaint counsel's discovery demands of respondents in this case, subsequent to issuance of the complaint, have been minimal. It most certainly stretches credulity to have this claim by A & P include reference to the recent requests for admissions. The evasive and non-productive responses of respondents to those requests certainly show that they did not use up a great deal of time in preparing such responses.

3. A & P counsel asserts that Count III would require A & P to pass along to the consuming public the cost savings realized on private label milk. (Affidavit of ~~Denis~~ McInerney, p. 4). While complaint counsel cannot see that this result would be undesirable, we want to note that A & P is charged

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12/ The citation to the Pacific Molasses case, 356 F.2d 386 (5th Cir. 1966) is inapplicable to the present case. There complaint counsel had failed to comply with a pre-trial order requiring them to supply the identity of witnesses to respondent prior to hearings. It was held that the failure to inform respondent of the identity of witnesses, as ordered, had resulted in the denial of the right to cross examine those witnesses. Those circumstances do not exist in this case.

with entering into a combination to stabilize or maintain prices, not with a failure to pass on its savings on private label milk. Nothing in the complaint or the proposed order herein would require A & P to "pass along to the consuming public the cost savings realized on private label milk."

4. On p. 3 of Mr. McInerney's affidavit, item 4, it is indicated that the 1969 subpoena to A & P merely reproduced the production of documents which A & P had made available to the Commission investigator in 1967, with some additional requests. Mr. McInerney fails to note that the subpoena return on May 15th produced much material called for in the investigator's original request, but which was not made available to the investigator as requested in 1967. Among other things this material included much of the "correspondence and other documents which relate to the bids and negotiations for the supply and/or purchase of both private and vendor label milk and dairy products between A & P on the one hand and all bidders and suppliers on the other hand." (From the investigator's original letter of request). It also included invoicing to stores in the "Chicago metropolitan area" other than those invoices for "Chicago and Suburbs" stores which had been made available to the investigator in June, 1967. The implication that the subpoena in 1969 was unnecessary, is clearly refuted by these facts and others reported in the accompanying affidavit from Attorney-Examiner Richard A. Palewicz.

5. Respondent A & P notes that since the issuance of the complaint herein that a treble damage action has been brought against A & P, based on similar allegations, in the case of Parker v. The Great Atlantic & Pacific Tea Company, Inc., et al, N.D. Ill., Docket No. 71C 3075. It is noted that A & P has filed a cross-claim against Borden in that matter. (Motion, pp. 2 and 23). It is somehow implied that this supports A & P's request for dismissal on the bases of discontinuance and that past grievances should be "left to the courts." Quite to the contrary, this private action only further illustrates the timeliness of and necessity for the Commission action.

Conclusion

For all of the above reasons, the arguments of respondent A & P in support of its motion for dismissal of the complaint, or in the alternative, for cancellation of postponement of the hearings set for November 20, 1972, are without merit. Therefore, complaint counsel respectfully request that such motion be denied.

Respectfully submitted,

John J. Mathias
John J. Mathias

Edwin R Soeffing per AGS
Edwin R. Soeffing

Andrew G. Stone
Andrew G. Stone,
Counsel Supporting
the Complaint.

Peter C. Ward
Peter C. Ward,
Assistant Director,
Bureau of Competition.

October 20, 1972.

I, Richard A. Palewicz, being duly sworn, depose and state as follows:

In February 1967, I was an Attorney Examiner in the Chicago Field Office of the Federal Trade Commission and was assigned to investigate the private label milk and dairy products agreement between The Great Atlantic & Pacific Tea Company, Inc. (hereafter A&P) and The Borden Company (hereafter Borden) in the Chicago trading area for possible violations of the amended Clayton Act and Section 5 of the Federal Trade Commission Act.

In February and March 1967, I contacted both A&P and Borden requesting certain data, as well as supporting interviews with knowledgeable company personnel. Borden on March 17th and A&P on March 28th, 1967, both indicated they would comply with my investigative demands, but that they would be unable to do so within the time stated in my request. Time extensions were given to Borden first to June 14th and later to July 10th, 1967. (Letters of May 31, 1967 and June 20, 1967). When nothing was received from Borden by July 10th, I wrote a strong letter to Borden, on July 14, 1967, calling to mind the investigational powers of the Commission and noting that, although I wished to proceed on a voluntary basis if possible, compulsory process would be used, if necessary.

On July 19th, 1967, Borden wrote to me giving me certain data I had requested in another investigative file for the Macomb, Illinois trading area (not involved in the A&P Chicago Unit agreement), but refusing to furnish any of the data dealing with the Chicago trading area. Its ground for this refusal was that these matters were under investigation by the Department of Justice "under the Final Judgement entered on April 24, 1963, in Civil Action No. 51 C947 in the U.S. District Court for the Northern District of Illinois, Eastern Division." This was the first time this question had been raised with me by Borden during the five months of our dealings.

By letters of September 8, 1967 from me and one of September 13, 1967 from Chief, Midwest Office, Antitrust Division, Borden was notified that the Commission's investigation was separate and apart from the Justice Department investigation and that Justice Department had referred the entire matter to the Commission and was no longer active in the investigation.

RAP

ATTACHMENT I

Borden then began to give me some of the data requested, beginning with an interview with house counsel and Borden's attorney on September 18, 1967, at which a very limited amount of documentation was returned - just 7 pages consisting primarily of price lists. Numerous telephone inquiries over the next two months, directed to Borden's house counsel, finally produced two annual reports of The Borden Company for 1965 and 1966; and on December 4, 1967, I also received some additional price lists and a summary of the prices Borden charged to A&P for private label milk in Chicago for the period November 1965 through June 1967.

More telephone calls to Borden's house counsel over the next couple of months produced some additional materials, primarily invoicing to some of the A&P stores in the city of Chicago. Again on February 16, 1968 I had to write to Borden's counsel, Mr. Joseph Greaves, pointing out that I had still not received "a large portion" of the data requested of Borden a year previously, concerning Borden's dealings with A&P in the Chicago area.

Finally in mid-March 1968, I was allowed to inspect various documents from Borden's files dealing with its negotiations with A&P in Chicago and was supplied much of the information requested back in February 1967.

In the meantime, I was having much the same experience with A&P. A&P had provided a few documents from time to time. (Corporate structure data and an annual report for fiscal 1967). A&P claimed to have supplied all available material to me, in response to my request, on June 5, 1967, when I was allowed to review certain invoices and bids from Borden and Bowman Dairy. However, it appeared to me that I had not been supplied with the bulk of the documentation requested, especially in connection with my request for all correspondence and other documents relating to the bids and negotiations for the supply of private label milk in the Chicago area. Moreover, I had requested interviews with some of A&P's Chicago personnel in connection with the private label dairy purchases and had been unable to obtain such interviews. Among other reasons for such requested interviews, I wished to check out the thoroughness of A&P's production of documents on June 5th. On January 12, 1968, I was finally notified by letter from A&P's attorney that A&P

"must continue respectfully to decline" my requests for interviews of Chicago A&P personnel.

In the meantime, on December 29, 1967, I had requested an updating on the weekly billing summaries previously supplied by A&P from April 1, 1967 through June 30, 1967. Such summary billings, for the period January 1, 1965 through March 31, 1967, for the Chicago and Suburbs area only, had constituted the bulk of the materials produced on June 5, 1967 by A&P. This additional invoicing was supplied for the Chicago and Suburbs area on February 5, 1968.

When I had the opportunity to review the materials I had received from Borden in March 1968, my suspicions concerning the quality of A&P's compliance with my request were confirmed. Included among the other documents dealing with the inter-company association between Borden and A&P was a file memo dated 3/31/67 concerning a conference between Borden and A&P personnel. The memo was prepared by Joseph Malone, a Borden official who participated in the conference. On page 2 thereof, in the last paragraph, there is reference to the fact that the F.T.C. was investigating their private label contract. Mr. Bartels, an A&P official, is quoted by Mr. Malone as stating that the Commission investigation presented "no problem to them [A&P] as they would simply submit copies of invoices." (See copy of memorandum attached hereto as Exhibit 1).

After review of the files and careful consideration of the facts developed so far in the investigation, I made the recommendation to the Commission via the Bureau of Restraint of Trade that a subpoena duces tecum be issued against A&P. In accordance with procedures then in effect in our Washington headquarters, the subpoena request was placed in charge of members of the trial staff of that Bureau, which reviewed and revised my subpoena request and forwarded it to the Commission. I was consulted frequently during this process.

The subpoena was issued against A&P on January 22, 1969 and was returnable before me, in Chicago on March 17th, 1969. A&P asked for and received a postponement until May 15, 1969. A&P returned the bulk of the subpoenaed materials on that date. Certain explanatory materials were not made available and other data were omitted from the return. These were promised to be supplied within a few weeks. Additional data was supplied by A&P counsel by letters dated May 16th and June 25, 1969.

The materials received in the subpoena return were quite voluminous. This data had to be reviewed and collated, prior to seeking explanatory testimony from A&P personnel. Since A&P had already informed me that its personnel would not be made available for interviews, it was then necessary to seek subpoenas ad testificandum for the A&P officials who appeared to be the most heavily involved in the negotiations and dealings with Borden.

These subpoenas were issued on November 13, 1969 for appearances on December 4th and 5th, 1969. The hearing dates were postponed at A&P's request to December 9th and 10th, 1969.

Additional hearings were held on December 30, 1969, at which time two Borden officials, Ralph Minkler and Gordon Tarr were called to testify concerning Borden's dealings with A&P.

During the period of time during which the A&P hearings were being set up and held, additional data was being received from the Borden Company, especially concerning the identity of competing customers in Chicago and northwestern Indiana. Borden's records were reviewed for the purpose of selecting customers of substantial size located in areas likely to be competitive with A&P stores included in the A&P-Borden agreement. Interviews were held with a substantial number of these stores to determine the questions of competition, existence of discrimination and possible injury.

Following the December 1969 hearings, the information thus far received was reviewed and the file was forwarded to Washington headquarters on March 31, 1970, with recommendation for complaint. Upon review at headquarters, it was requested that certain additional data be obtained by me concerning Borden's sales to A&P and competing purchasers in northwestern Indiana. This supplemental investigation was necessary in order to up-date the A&P invoicing to cover the same time period represented by invoices received from Borden showing sales to competing grocers in this area. This supplemental investigation was completed by May 28, 1970 and returned to Washington headquarters.

Except for a few minor requests from headquarters for additional information, the file was thereafter in the hands of headquarters personnel for completion and recommendation to the Commission.

A-4-f

COMPLAINT COUNSEL ANSWER TO A&P MOTION

It is my opinion that my investigation was conducted as expeditiously as the complexities of the case and the lack of cooperation from respondents would allow.

Richard A. Palewicz

Richard A. Palewicz

Subscribed and sworn to before me, a duly authorized Notary Public of the District of Columbia on this 18th day of October, 1972.

Juanita A. Wells

COMPLAINT COUNSEL ANSWER TO A&P MOTION

3/31/67

FILE MEMO

A & P

Tarr called to ask consideration of Malone accompanying Gose and Tarr to meet with Bartels, indicating that his presence might be helpful to the matter. There was no objection.

Met at the A & P office at 10:15 A.M. Met Bartels who was joined with Witzke and Carver from A & P and Gose, Tarr and Malone from Borden.

Gose indicated that we were there in response to a request for additional data, principally in respect to furnishing the wage rates in effect after May 1, 1966 and immediately before. Stated that we (Borden) were engaged, during the past day, in reviewing current factors relative to the union negotiations immediately coming up, and this is why we had not supplied the information earlier this week. Bartels indicated he did not know why it took so long, but he understood the problem.

Gose presented Bartels, Witzke and Carver with our letter dated 3/31/67, indicating that he believed the data set forth complied with their request.

Bartels read the letter and examined the two schedules attached thereto, the others (Witzke and Carver) doing likewise. He paid a lot of attention to Schedule No. I which set forth in detail the various elements of wage cost increase. He made inquiry as to what the vacation cost represented, the pension and welfare cost, and particularly the increase in Social Security. These increased cost factors were explained to him -- the Social Security factor was belabored and he (Bartels) had Carver check same. He left, and upon returning, gave Bartels a note and no more discussion ensued.

Bartels made reference to the fact that the Chicago market had about the largest spread between the Class I price and the in-store price of any market where comparisons have been made. He indicated that there were markets where they were able to buy cheaper than in Chicago. The point was stressed that he can't tell us (Borden) what to charge but we have to realize that this factor gets to a point where they can buy cheaper and further indicating that competitors have been in to see them continually. He wanted us to understand that he was not threatening us (Borden) but this was the case.

Bartels questioned why we (Borden) waited so long to secure this increased cost factor which occurred last May, and raised the question

PALEWICZ EXHIBIT I

about any subsequent wage increases that will result from 1967 negotiations.

Gose indicated that we (Borden) had requested this consideration last June (1966) which was turned down by A & P. Gose stated that we (Borden) had attempted to work out the matter, but the need still remains. Bartels stated that Borden's need was Borden's problem, and he was only concerned about buying at a competitive price.

Bartels referred again to the schedule which disclosed the various classes of wage cost increase. Looking at the basic wage increase of 10 cents an hour for dairy employees and 6.3 cents for wholesale drivers, he estimated that this was about a 3% to 4% increase. Further, he estimated that it appeared to him that we (Borden) had a payroll cost of about $100,000 a week. Malone indicated that it was about in that neighborhood (week of 5/28/66 - $86,000.) He went on to state that wage items such as vacations, etc. really have to come out of other cost reductions - improved efficiencies, you just can't keep adding on and on to a price the full impact of each wage cost increase. He stated that they have the same problem in their bakery operation and they have been able to effectuate efficiencies that absorb such increased wage costs. Malone pointed out that this adjustment is a much more difficult matter when related to a most modern, newly constructed plant like Woodstock which was opened early in 1966 and was fully automated. Malone also pointed out that we (Borden) had been able to keep costs favorably in line because of additional volume secured which helped to offset other rising costs which have occurred in our business. Bartels continued to stress the fact that this type of wage costs have to be absorbed by further efficiencies.

The cost increase applying to paper cartons was raised by Bartels. He indicated that this factor had not been brought up in any other market and asked Carver if he had any recollection of this factor and he indicated "no." Witzke indicated that some increases took place in respect to paper bags - two 5% increases, one of which was rescinded.

Bartels referred again to the matter of being competitive in his buying program and indicated that we (Borden) were no doubt familiar with the fact that F.T.C. had requested information from them (A & P) and that this presented no problem to them as they would simply submit copies of our billings. Carver stated that the requests referred to prices and volumes going back to 1965. Gose then indicated that when he was summoned to the phone during this meeting, it was a call from Mr. Greaves, who heads up Borden's Chicago law office, who informed him that Borden had received

FILE MEMO - A & P 3/31/67

a request for information from F.T.C. and considered it important to know this, especially when he was conferring with A & P. This matter did not seem to disturb Bartels. He asked a question about "returns" and was advised that the only credit A & P received was in connection with faulty containers or inferior quality.

Bartels then returned to the wage cost increases. He indicated he found no fault with our information -- he believed it and stated that there might be some justification in recouping some of the costs. He constantly touched on buying competitively, stating that this position was not to be considered as a threat. Believed strongly that certain elements of wage cost increases had to be absorbed through increased efficiencies -- also had to believe that there was some leverage in the cost effects. He indicated that he recognized the basis of the hourly increase demand but could not look at the other items. He expressed that in his opinion he could possibly look at a price adjustment factor of $.0018 per point and asked us to think it over.

Gose again expressed the fact that these costs, as we had expressed, were real and valid cost increases. Bartels intimated that he can't tell us how to run our business -- that is Borden's decision to make. However, if we (Borden) want to consider this factor, he would see what could be done.

Gose expressed his gratitude for this exchange of views and discussion of the problem. Bartels stated they were very well satisfied with the quality of the products supplied and the service rendered. Gose thanked him and indicated that the matter will be reviewed further and that communications would be made shortly.

COMPLAINT COUNSEL ANSWER TO A&P MOTION

I, John J. Mathias, General Attorney, Federal Trade Commission, being first duly sworn, do depose and state as follows:

I have been assigned as trial counsel in the matter of The Great Atlantic & Pacific Tea Company, Inc., and The Borden Company, since its investigative stage. I assisted the investigating attorney in conducting investigational hearings involving A&P during the investigative stage of this matter and was one of the counsel to which this matter was assigned for review and evaluation upon its receipt from the Chicago field office in March 1970. After a brief supplemental investigation, analyses of the evidence in the file began in late May 1970.

In the course of our review of the file and the accounting analysis of the various sales records involved, a number of questions were raised which were presented to Borden by letter of August 14, 1970. The reply of Borden's counsel, dated August 18, 1970, indicated doubt that the requested information could be supplied within the near future.

At the same time, it became apparent that the delay caused by A&P and Borden during the course of the field investigation required considerable updating and rounding-out of the documentation contained in our files. Accordingly, as soon as the files had been sufficiently analyzed to allow as narrow an inquiry as possible, a subpoena duces tecum was issued against Borden on September 24, 1970 for return on November 4th, 1970. Borden requested and received a postponement until November 19th, 1970.

It appeared following a review of the materials supplied by Borden at the November 19th hearing that Borden was not in complete compliance with the requirements of the subpoena. Among other things, documents revealing the methods by which certain rebates had been computed were omitted. Accordingly, by letter dated December 8, 1970, Commission counsel requested the missing data and interviews of certain key Borden personnel. Over succeeding few months some of the missing data was obtained, the invoicing and rebates were collated and the staff accountant compared pricing to

JJM

ATTACHMENT II

A&P on private label purchases to those of competitors. All of such work was done quite expeditiously, along with the conduct of interviews with certain additional Borden personnel. The review and recommendations were completed within a few short months. Letter A of the Commission, along with the Notice Complaint and Order were mailed on May 28, 1971 to respondents.

A review of the history of the investigation and pre-trial procedures in this matter reveal that if there has been any undue delay in the course of preparing this matter for trial, it has been occasioned by respondents' themselves, rather than by Commission attorneys. At every stage of these proceedings respondents have sought to stretch and protract the time involved. Even in consent negotiations, A&P sought and received an additional 30 days, during which time no additional progress was made toward a settlement. Respondent A&P clearly admits that complaint counsel have done everything in their power to expedite these proceedings since the issuance of the complaint last October 1971. (Motion to Dismiss, p. 10). The record clearly shows that the investigating attorney and trial counsel at headquarters have tried equally as hard to expedite this matter in its earlier stages. Aside from the time required to process this matter, due to its complexities, the only explanation for any delays herein, involves the conduct of respondents themselves.

John J. Mathias
John J. Mathias

Subscribed and sworn to before me, a duly authorized Notary Public of the District of Columbia on this 18th day of October, 1972.

Juanita A. Wells

COMPLAINT COUNSEL ANSWER TO A&P MOTION

Staff [illegible] 92 [illegible]

Yesterday's meeting with Elmer Schmidt we believe concluded this matter.

Comments yesterday as means before that we meet competition.

At a point of the old details were covered - point of letter - sensitive area - had to be done, and we have to cover same -

Talked about letter - A&P had to realize that when you come out with a letter - the biggest single thing that has happened in the cheese market. Negotiation was very much followed - A&P was said that we are - Understand and recognize letter indicate - evaluation of same size availability. have to always says - competitor if we are responsible not below cost - not designed to injure, difficult to prove any matter of cost - defense of meeting competition - I am aware of meeting of competition - You were to called on to state same. Borden - Understand what you are saying, technically important, that you brought it up - Should bring on to the action here.

RWM says " Borden & A&P have a relationship for a great many years - great respect for our customer they for me, Day same - A&P wanted F.K. with - asked for a quotation - Stated and put together a quotation - A&P were surprised - thought they were going to get a much better price on F.K. - Considered they would have to go outside for other quotation - Fed - was terribly shocked -

conditions were tremendously different. Told me that if our quote was uncompetitive we might not. Examiner: desires one more day to look at it from "anyhow" accounting. Record -- seems you have substantially met the other quotes. E.S. I think this is 100% right - We will get into this with Bill [illegible] our legal counsel. Have learned the possible legal involvements and am glad you brought this up. Our opinion they had quotations same as we did.

Seems more than ever - this brings you there. Schedule reflects prices between various markets due to difference in farm price.

Several glass cartons talked to them about their buying the condition. Get into details what we ever prefer - Stay away from P.L. on glass and let me price it - any anytime.

Staff 9/22/65

Yesterday's meeting with Elmer Schmidt we believe concluded this matter.

Convinced yesterday as never before that we met competition.

At a point after all details were covered - point of letter - sensitive area - has to be done and we have to cover same -

Talked about letter - A&P has to realize that when you come out with a letter - the biggest single thing that has happened in the Chicago market. Litigation can very well follow. A&P is in same boat we are. Understand and recognizes. Letter indicate - customers of same size - availability. have to also say - our prices to you are defensable - not below cost - not designed to injure. Difficult to prove up matter of cost. Defense of meeting competition. In our opinion meeting of competition - you will be called on to state the same. Said - understand what you are saying, tremendously important, glad you brought it up - should hang on to the other bids.

RRM says "Borden and A&P had a relationship for a great many years - great respect for our customers - they for us. Day came - A&P wanted P. L. milk -asked for a quotation. Studied and put together a quotation - A&P was surprised - thought they were going to get a much better price on P. L.

Concluded they would have to go outside for other quotations - Did - were terribly shocked - Quotations were tremendously different. Told us that if our quote was unchanged we were out. Examined - decided we would have to look at it from "anyhow" accounting. Revised - now you have substantially met the other quotes. "E.S." I think this is 100% right - We will get into this with Bill Lewis - Ira and legal counsel. Have discussed the possible legal involvement and am glad you brought this up. Our opinion they had quotations around our bid.

Said more than once - this brings you there. Schedules reflect prices between various markets tied to difference in farmer prices.

Covered glass gallons - talked to them about their buying the containers - Got into details what we were prefer - Stay away from P. L. in glass and let us price it-very receptive.

000096

FEDERAL TRADE COMMISSION
RECEIVED
OCT 25 1972
SECRETARY

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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Served
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In the Matter of

THE GREAT ATLANTIC & PACIFIC
TEA COMPANY, INC.,
a corporation, and
BORDEN, INC.,
a corporation.

DOCKET NO. 8866

ORDER RULING ON A&P'S REQUEST FOR PERMISSION TO APPEAL, A&P'S MOTION TO DISMISS COMPLAINT AND FOR RELATED RELIEF, AND CERTIFYING VARIOUS MATTERS TO THE COMMISSION

I

On September 19, 1972, the undersigned issued an order denying A&P's motion to dismiss Count I of the complaint on the ground that it did not state a cause of action. The motion to dismiss Count I on the ground of legal insufficiency was denied since the questions presented could not be resolved absent an evidentiary record; further A&P had not met its burden of establishing that complaint counsel would be unable to prove facts justifying the relief requested. A&P's contention that the Count I charges should have been the subject matter of a rulemaking proceeding rather than a complaint, however, challenges the exercise of the Commission's administrative discretion in choosing among enforcement alternatives. Challenges of that nature are not within the undersigned's jurisdiction. See Crush International Limited, et al, F.T.C. Docket No. 8853 (Commission Interlocutory Order, March 23, 1972). The order of September 19, therefore stated that on appropriate motion, this issue would be certified to the Commission.

On September 27, 1972, A&P pursuant to §3.23(b) of the Rules of Practice, filed its request for permission to appeal the order denying its motion to dismiss. A&P also requested that the issue of whether the Count I charges should have been the subject matter of a rulemaking proceeding be certified. Complaint counsel filed their answer in opposition to that request on October 4, 1972.

The undersigned adheres to the view that a resolution of the issues raised by A&P's challenge to the legal sufficiency of the Count I charges would be premature at this time. No finding can therefore be made, as required by §3.23(b) of the Rules of Practice, that A&P has demonstrated the necessity for interlocutory review of that issue.

The question of whether the Commission abused its discretion in dealing with the Count I charges by way of a litigated rather than a rulemaking proceeding, over which the undersigned has no jurisdiction, is certified for review. No recommendation is made with respect thereto since it involves policy questions not within the undersigned's area of responsibility.

II

A&P has filed a second motion to dismiss the complaint, dated October 12, 1972, which also asks for related relief. This motion requests that each count be dismissed on the ground that delay in issuance of the complaint by the Federal Trade Commission has deprived A&P of the opportunity to obtain evidence necessary to its defense in violation of A&P's constitutional rights, the Administrative Procedure Act, and the Commission's rules 1/. As a second ground of dismissal, A&P asserts the proceeding is no longer in the public interest for the reason that the practices alleged illegal have been discontinued and are unlikely to recur because the parties are no longer doing business with each other as alleged in the complaint.

A&P also moves to cancel the evidentiary hearings now scheduled to commence November 20, 1972, pending final determination of both motions to dismiss.

Complaint counsel oppose the motion by their answer dated October 20, 1972. They contend in the answer and attached affidavits that the Commission's investigation and trial of this case has moved as expeditiously as circumstances and the complexities of the case permit. In addition, complaint counsel ascribe much of the time lag to delaying tactics on the part of respondents. They also contend that as early as 1965, respondents were aware that the transactions

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1/ The transactions under consideration here apparently had their inception in the period 1964-65.

under consideration might become the subject of an antitrust proceeding.

No finding can be made on the basis of the motion, answer and accompanying affidavits alone that the interval between the inception of the investigation and issuance of complaint constituted an abuse of discretion on the part of the Commission. Moreover, the motion to dismiss basically challenges the exercise of the Commission's administrative discretion in determining when to issue complaint. This is not properly an issue before the undersigned. See _Crush International Limited_, _supra_. It must, therefore, be certified to the Commission.

The question of whether A&P has an adequate opportunity to defend, on the other hand, appears to be a factual question which would properly be before the undersigned were it not so "intertwined" 2/ with the allegation of administrative abuse in delaying the complaint. Upon review of the motion, it is the undersigned's view that a determination of this fact question is premature and should not be decided in the absence of an evidentiary record. For example, without having heard the witnesses and reviewed respondent's case on defense, the undersigned is in no position to definitively evaluate the possible prejudice resulting to A&P from the time lag in question 3/.

2/ See _Crush_, _supra_.

3/ Among other things, A&P contends certain witnesses are not available, the witnesses' memories have dimmed and that as a result of the time lag, documentary evidence prerequisite to proper cross-examination is not available. A&P also asserts documents necessary to reconstruct market conditions in the relevant market for the period 1965-66, cannot be obtained. In addition, respondent states that its discovery has established that documents necessary to the cost justification and meeting of competition defenses cannot be secured. With respect to the Count III charges, A&P claims that because of the paucity of relevant documents, it will be severely handicapped in showing, as it expected to do, that respondent's prices were not unusual and constituted— a unilateral exercise of reasonable and ordinary business judgment. A&P also contends that, as a result of delay, documents material to assessing the accuracy of certain proposed Commissions exhibits are not available.

Turning to the issue of whether the complaint should be dismissed on the ground of staleness, the undersigned notes that complaint counsel's evidence relating to Count II will apparently go up to March of 1970, and the evidence to be adduced under Count III will pertain to the period 1964-68 (Tr. 924-26). Accordingly, no finding can be made at this time, without additional evidence, that the complaint should be dismissed for that reason. A dismissal of the complaint on the basis of discontinuance would be similarly premature. Essentially, however, the request for dismissal for reasons of discontinuance and staleness is interrelated with the contention that the Commission abused its discretion in delaying issuance of the complaint. These questions will also be certified.

Basically, the motion to dismiss raises fact issues which should be decided after hearing. The undersigned, therefore, recommends that the Commission deny the motion. The request for cancellation of the November 20, 1972 hearing date is also denied for that reason.

Nor is the undersigned convinced, after reviewing A&P's contentions on this point, that fairness requires a postponement of the hearing. The turnover of complaint counsel's evidence appears essentially complete. The undersigned has ruled that in certain instances, witnesses may be recalled for additional cross-examination and that respondents may have an interval between the case-in-chief and the defense to complete their discovery 4/. In this conection, §3.41(b)

4/ The ruling on this point stated as follows:

> "The next point to which I intend to address myself is the question of deferred cross-examination of witnesses and whether that is crucial as far as you are concerned. Here my ruling will be that I will expect you to cross-examine witnesses to the extent you are able at the time of complaint counels' case in chief. I would suspect in the case of most of the witnesses it is doubtful that recall would be justified. I will be willing to recall witnesses for cross-examination in these instances where you can show me, as a result of discovery, you have information which would be helpful to you in cross-examining the witness which you did not have before. I would suspect such an occasion would arise primarily in the case of expert witnesses, although there may be exceptions. (Continued on next page)

of the Rules of Practice provides expressly:

> "...the hearing examiner...may grant a reasonable recess at the end of the case-in-chief for the purpose of discovery deferred during the prehearing procedure where the examiner determines that such recess will materially expedite the ultimate disposition of the proceeding."

In the undersigned's view, this procedure will materially expedite the disposition of this case and affords respondents a reasonable opportunity to prepare their defense. Accordingly,

IT IS ORDERED that the request for certification of A&P's application to appeal the order denying its motion to dismiss Count I of the complaint for legal insufficiency be, and it hereby is, denied.

IT IS FURTHER ORDERED that the question of whether the charges under Count I should have been the subject of a rule-making proceeding be, and it hereby is, certified to the Commission.

IT IS FURTHER ORDERED that A&P's motion to dismiss the complaint dated October 12, 1972, be, and it hereby is, certified to the Commission with the recommendation that it be denied.

IT IS FURTHER ORDERED that the request for cancellation of the November 20, 1972 hearing date be, and it hereby is, denied.

Theodor P von Brand.

Theodor P. von Brand,
Administrative Law Judge.

October 24, 1972

In any event, this is something I would intend to rule on it as the occasion arises, and I think that will be governed primarily by the question of: 'In the meantime, did you get additional information which you could not reasonably be expected to have before.'" (Tr. 980)

C00171

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Miles W. Kirkpatrick, Chairman
Paul Rand Dixon
Everette MacIntyre
Mary Gardiner Jones
David S. Dennison, Jr.

1/19/73

1/29/73 ISD
1/29/73 BS
1/31/73 [illegible]

In the Matter of THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC., a corporation, and BORDEN, INC., a corporation	)	DOCKET NO. 8866

ORDER RULING ON CERTIFICATION ORDER OF ADMINISTRATIVE LAW JUDGE AND ON RESPONDENT'S MOTION FOR LEAVE TO BRIEF AND ARGUE ISSUES RAISED BY CERTIFICATION ORDER AND FOR RELATED RELIEF

This matter is before the Commission on the administrative law judge's certification order, dated October 24, 1972. The order certifies to the Commission A & P's motion filed September 1, 1972, for dismissal of Count I of the complaint for failure to state a claim under Section 5 of the Federal Trade Commission Act insofar as the motion claimed that the charges in Count I should have been the subject of a rulemaking proceeding. 1/ It also certifies a motion by A & P dated October 12, 1972, requesting dismissal of all three Counts of the complaint on the grounds that delay in issuance of the complaint has deprived A & P of the opportunity to obtain evidence needed in its defense and that the complaint is no longer in the public interest because the acts and practices alleged in the complaint have been discontinued and are not likely to recur.

Before addressing ourselves to the certified motions, we turn first to a motion filed with the Commission by A & P on October 25, 1972, subsequent to the administrative law judge's certification order. In its motion A & P requests permission to file an additional brief on the issues raised on certification and to argue the matter orally before the Commission. It also seeks a continuance of the hearings which had been scheduled to commence on November 20, 1972, pending the Commission's disposition of the certified questions.

1/ Other arguments contained in A & P's motion of September 1 were ruled upon by the administrative law judge and were disposed of by an order of the judge, dated September 19, 1972, dismissing the motion. By Motion for Leave to Brief and Argue Issues Raised by Certification Order and For Related Relief, dated October 25, 1972, A & P invites us to review all the arguments dismissed by the judge's ruling of September 19th notwithstanding the refusal by the judge, as indicated in his certification order of October 24, 1972, to make the written determination with respect to his ruling which is required by § 3.23(b) of the Commission's Rules of Practice. We decline the invitation. The purpose of § 3.23(b) is to grant the administrative law judge the authority to limit the opportunity for requesting interlocutory review to matters (other than those matters specified by § 3.23(a) of the Commission's Rules) which, in his opinion, fall within the guidelines established by § 3.23(b). To accept A & P's invitation would be to undermine this purpose.

We think that the issues before us already have been briefed extensively. Even A & P appears to agree on this point. It notes in its motion that the issues have been briefed "in several separate submissions" 2/ and that its purpose in submitting a further brief would be to have "a single statement of position." 3/ We see little value to adding still more to the now sizeable volume of paper work, or to allowing oral argument, in the matter. Accordingly, A & P's request is denied.

The request for continuance of the hearings is, as a practical matter, mooted by the withdrawal from participation in this proceeding by Administrative Law Judge Theodor P. von Brand on November 21, 1972, pursuant to § 3.42(g) of the Commission's Rules of Practice. And the administrative law judge now appointed to this proceeding is instructed to proceed with the hearings at the earliest reasonable date.

I

The sole question before us with respect to A & P's motion to dismiss Count I of the complaint is whether we abused our discretion by issuing complaint as to this Count, rather than proceeding through rulemaking. A & P's contention rests on the assumption that the charge of Count I involves a wholly novel challenge to activity never before found to be a violation of Section 5 of the Federal Trade Commission Act. Proceeding from that assumption, A & P argues that it would be unfair for the Commission to issue an order prohibiting the challenged conduct without having first, via a trade regulation rule, forewarned A & P that such conduct is unlawful.

The challenged activity is not as novel as A & P claims. We think that the alleged

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2/ Motion for Leave to Brief and Argue Issues Raised by Certification Order and For Related Relief, dated October 25, 1972, page 2.

3/ Id.

practice is similar enough to the facts of the Kroger case 4/ to warrant a full hearing on the record and we would be remiss in our obligation to the public interest were we to dismiss the Count so prematurely, as A & P requests. Moreover, in issuing this complaint, we made the determination that the practices alleged therein, including those of Count I of the complaint, if found to exist on the basis of substantial evidence of record, could best be dealt with by means of an adjudicative order to cease and desist. This determination was clearly our responsibility to make. Federal Trade Commission v. Universal-Rundle Corporation, 387 U.S. 244 (1967); Moog Industries v. Federal Trade Commission, 355 U.S. 411 (1958). And we are not persuaded that we should reverse our decision without the benefit of a full record. A & P's motion to dismiss Count I of the complaint is, therefore, denied.

II

A & P also moves to dismiss the complaint in its entirety on two grounds: (1) the delay between the inception of the investigation and issuance of complaint constitutes an abuse of discretion on the part of the Commission; and (2) the proceeding is no longer in the public interest since the alleged illegal practices have been discontinued and are unlikely to recur and the evidence which would be introduced at hearings is stale.

We find that the time taken to conduct the investigation leading to the issuance of the complaint herein is neither atypical nor inordinate, particularly in view of the complexity of the investigation and the limited manpower available to the Commission for conducting investigations in connection with its varied and broad statutory responsibilities. Moreover, it seems clear from the pleadings and affidavits before us that respondents were timely alerted to the fact that the Commission was interested in the private label arrangement between them

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4/ The Kroger Company v. Federal Trade Commission, 438 F.2d 1372 (6th Cir. 1971).

in the Chicago trading area from the standpoint of possible violations of the amended Clayton Act and Section 5 of the Federal Trade Commission Act. And there is no indication that either A & P or Borden was ever advised that the Commission had abandoned its investigation. On the contrary, the papers before us clearly indicate that attempts to pursue and complete the investigation were made by Commission staff on a continuing and regular basis during the period March 1967-December 1969. 5/ Accordingly, we find no abuse of discretion in our issuance of complaint herein.

We agree with the administrative law judge, however, that the question of alleged unfair prejudice to A & P by possible denial of adequate opportunity to defend is one which cannot be answered now, but only at the conclusion of hearings. Therefore, the motion in this respect will be denied without prejudice to A & P to renew its argument in conjunction with the submission of proposed findings of fact and conclusions of law at the close of the reception of evidence.

We also agree that questions of staleness of evidence and good faith discontinuance can only be decided after all the evidence is in, particularly in a situation of this sort where the contractual arrangement with which the complaint is concerned was discontinued by the respondents subsequent to formal issuance of the complaint. 6/ Accordingly,

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5/ Affidavit of FTC Attorney Examiner Richard A. Palewicz, dated October 18, 1972, which appears as Attachment I to complaint counsel's Answer dated October 20, 1972. Mr. Palewicz's statements as to the dates on which contacts were made with respondents in the course of the investigation are not challenged by A & P's Reply, dated October 21, 1972. On the contrary, A & P's Reply, at page 4, notes that Mr. Palewicz's affidavit omitted one interview with an A & P official.

6/ A & P's Motion to Dismiss the Complaint and For Related Relief, p. 22.

ORDER OF COMMISSION

D. 8866

IT IS ORDERED that respondent's motion for leave to brief and argue issues raised by certification order and for related relief be, and it hereby is, denied.

IT IS FURTHER ORDERED that respondent's motion to dismiss Count I of the complaint, certified to the Commission on October 24, 1972, be, and it hereby is, denied.

IT IS FURTHER ORDERED that respondent's motion to dismiss the complaint, certified to the Commission on October 24, 1972, be, and it hereby is, denied.

By the Commission. Commissioner MacIntyre abstained.

Chas. A. Tobin

S E A L

Charles A. Tobin
Secretary

Issued: January 19, 1973

private label sales involved in this proceeding.

III-3. Borden objects to this request on the basis that it is not a statement of fact but rather a legal conclusion based on assumptions and matters not set out in the request. The request also goes beyond the geographical area to which complaint counsel have agreed to limit their proof and includes a time period of almost two years prior to any of the private label sales involved in this proceeding.

III-4. Borden admits that substantially all of the homogenized milk packaged in half-gallon contains bearing the A&P label which was supplied to A&P in the Illinois counties of McHenry, Lake, Kane, Cook, Du Page and Will and in the Indiana counties of Lake and Porter and Valparaiso, Indiana, during the period November 1965 through December 1968 was packaged by Borden's Woodstock plant. Borden objects to the remainder of Paragraph III-4 as unclear and in any event going beyond the scope of complaint counsel's case in chief.

III-5. Borden admits on information and belief that approximately 60% of the raw milk was purchased for Borden's Woodstock, Illinois plant during the period 1964 through 1968 produced on dairy farms in the State of Wisconsin.

In its Reply to Borden's Request for Admission dated August 17, 1972, complaint counsel asserted that information relating to the transportation of such raw milk is "irrelevant to the issues of this case." Borden therefore objects to the references in Paragraph III-5 to the transportation of such milk.

III-6. Borden admits that after Borden's Woodstock, Illinois plant began regular operation and up to December 31, 1968, raw milk was generally received at the Woodstock plant on a seven-day per week basis.

III-7. Borden admits that milk products processed at its Woodstock, Illinois plant during the period 1964 through 1968 were sold to a wide variety of customers in the Illinois counties of McHenry, Lake, Kane, Cook, Du Page and Will and in the Indiana counties of Lake and Porter and Valparaiso, Indiana, including but not limited to home delivery customers, customers served from wholesale routes, independent distributors, and customers served by contract haulers. The remainder of request III-7 is objected to as being so general as to be misleading, burdensome and impossible to accurately answer for the extended time period referred to.

III-8. Borden objects to the request contained in substantially identical request (Item III-5), A&P admits that approximately 60% of the raw milk purchased for Borden's Woodstock, Illinois plant during the period 1964-1968 was produced on dairy farms in the State of Wisconsin and except as admitted, A&P denies this request for admissions.

III 12

Admits that at various times during the period 1964-1970, A&P advertised in newspapers which were circulated in all or some parts of Oak Park and Franklin Park, Illinois and/or the cities of Gary, Hammond, Highland, Munster and Valparaiso in Indiana.

III 19 and 24

Admits that fluid milk is one of the more important commodities carried in retail grocery stores and that it is a perishable, high volume, fast turnover item sold by most food retailers. Milk is also a staple and is purchased more frequently than other products. Milk is not "highly standardized" since there are differences among milk products (e.g., in butterfat content). Except as so admitted, A&P denies these requests for admissions.

III 20 and 21

Admits that milk is used almost daily, that consumers are familiar with its price and that A&P and other retail grocers price it competitively. Fluid milk is one of several items price checked by A&P on a regular basis by visiting competitors' stores, and reviewing newspaper ads. Except as so admitted, A&P denies these requests for admissions.

III 22, 23 and 26

A&P admits that net profits are low in the retail grocery business, that costs are an important factor in it, that discounts, allowances and rebates of one or two percent are important, and that they are especially important on high volume items such as milk. Except as so admitted, A&P denies these requests for admissions.

III 25

Admits the products identified are important and are generally carried in retail supermarkets and except as

***

III 6

A&P admits on information and belief, based upon Borden's amended response to complaint counsel's substantially identical request (Item III-10) and additional information supplied by Borden, and subject to later correction if necessary, that substantially all of the fluid milk products Borden supplied under A&P's private label to A&P's stores located in the Illinois counties of Cook, DuPage, Kane, Lake, McHenry and Will and in the Indiana counties of Lake and Porter during the period November 1965-1970 were physically and chemically identical to the equivalent products contemporaneously sold under the Borden label to these A&P stores and to other stores in the "Chicago and Suburbs", Gary, Hammond and Valparaiso areas. Except as so admitted, A&P denies these requests for admissions.

III 7

A&P denies these requests for admissions on information and belief based upon Borden's amended response to complaint counsel's substantially identical request (Item III-11).

Borden under A&P's private label to A&P stores located in the Illinois counties of McHenry, Lake, Kane, Cook, Du Page and Will and in the Indiana counties of Lake and Porter, Indiana, during the period November 1965 through 1968 was physically and chemically identical to certain products contemporaneously sold under the Borden label to other stores in the "Chicago and Suburbs", Gary, Hammond and Valparaiso areas. Borden denies the remainder of this request.

III-11.

Borden denies this request.

III-14.

Borden denies this request.

III-21.

Borden denies this request.

III-28.

Borden admits by way of qualified answer that during the period 1963-1968, the Borden Chicago unit purchased raw milk as necessary to meet the desired production level of its plants, as determined, among other factors, by the expected demands of its customers for processed milk products. Borden admits that it processed raw milk and transferred processed milk products to its customers as expeditiously as was practical, although such expeditious transfer was not always practical. Both raw milk and processed milk products were stored at various stages for varying periods of time. Borden admits that it attempted to process the raw milk quickly in Borden's plant and transfer the processed milk as quickly as possible. Borden denies the remainder of this request.

III-30.

Borden admits by way of qualified answer that at all times during the period 1965-1968, as a matter of general practice, Borden coordinated its purchases of raw milk with among other things, its sales and deliveries, and attempted to sell as quickly as possible the processed milk products. Two of the results of selling processed milk products as quickly as possible were to minimize the period during which milk was stored, and to insure the freshness and quality of milk sold by Borden. Borden denies the remainder of this request.

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

FEDERAL TRADE COMMISSION
RECEIVED
SEP 18 1974
SECRETARY

In the Matter of

THE GREAT ATLANTIC & PACIFIC
TEA COMPANY, INC.,

BORDEN, INC.
a corporation.

DOCKET NO. 8366

ORDER SUPPLEMENTING AND MODIFYING ORDER OF SEPTEMBER 11, 1974 RE MR. HAVEMEYER'S COST JUSTIFICATION EXHIBITS

By order dated September 11, 1974, certain stated objections by complaint counsel to the reception in evidence of specified exhibits were overruled. Said order, however, did not take into consideration certain other objections by complaint counsel to time standards and Ex-Cello rentals in such exhibits, an issue separately briefed by both A&P and complaint counsel.

The data in question were made by Mr. Havemeyer, an A&P witness, and by Case & Co., a management consulting firm. These calculations were developed in 1949 on the basis of studies made of Bowman Dairy deliveries in Chicago and were reconfirmed by additional work in the 1950's and 1960's. The time standards identify specific elements of service and the time required to perform them. As such, they appear to be material and relevant to this proceeding involving a justification of a seller's price based upon ascertainable costs. Similarly, the machine rental costs were calculated for a third party for a different purpose, but would purport to demonstrate such costs.

A&P seeks the admission in evidence of these time studies and machine rentals. Complaint counsel object because the underlying data to these conclusionary calculations have not been made available to them. Moreover, it is complaint counsel's position that these calculations are biased, incomplete, stale and connected with previous litigation.

The primary thrust of complaint counsel's objections is the failure to have the underlying data, as a result of which they cannot cross-examine Mr. Havemeyer adequately and effectively. A&P replies that it has not withheld anything but that the underlying data no longer exists. It argues that evidentiary rules such as the hearsay rule do not necessarily apply to proceedings before the Federal Trade Commission but admits that the Commission's Rules require evidence to be reliable. It further cites Federal Rules which permit expert testimony even where the data upon which the testimony is based is inadmissible in evidence. But we are not here concerned with the admissibility of the underlying data. It is their availability or unavailability that controls the admissibility of the conclusionary calculations. A&P notes the cases where summaries of existing records were deemed inadmissible because existing underlying documents were not made available for review by the adverse party. A&P apparently would agree that the conclusionary calculations would be inadmissible if existing underlying data were not made available to complaint counsel. This reasoning, however, would result in giving greater credence to a conclusionary calculation which has no underlying data than one which simply fails to show it. In either case, the difficulty is the same. Unproduced underlying data prevent or impede effective examination of the summary. The reason for non-production is not the critical test. Rather, it is the harm to the adverse party who cannot effectively examine the summary document. In effect, we are asked to excuse A&P for its failure, despite great effort, to present the necessary evidence in support of its defense of cost justification. This would result, however, in shifting the burden of proof from A&P to complaint counsel, for which I see no warrant.

A&P seeks to overcome this result by arguing that complaint counsel had ample opportunity to cross-examine Mr. Havemeyer. As previously noted, however, effective cross-examination was hampered by the absence of the underlying data. Moreover, the time standards in question were developed, not by Case & Co. or by Mr. Havemeyer, but by a predecessor firm. Mr. Havemeyer began working for that predecessor firm in 1953, some four years after the standards were developed. He did not participate in the collection of the data so that his testimony on this issue could not serve to authenticate the raw data. If he, independently, made a different study in 1957 which "fell within the range of the data which had been taken from the 1949 time study", his expert opinion is to be evaluated for its probative weight but would not, in itself, serve to authenticate the 1949 study.

A&P also disputes complaint counsel's argument that the time standards were prepared for litigation. The studies were made in 1949 by a predecessor firm to Case & Co. which came into being in 1962. They were used in Mr. Havemeyer's cost studies connected with the Bowman case which was not concluded until 1963. Thereafter, as the A&P Reply dated May 16, 1974, puts it,

> ... when the Borden case was concluded, there was no further use for the underlying data and this material was thrown out.

This would appear to confirm the impression that the underlying data were prepared and kept only for purposes of litigation. If so, they do not constitute business records admissible in evidence as an exception to the hearsay rule. But we are not here concerned with the underlying documents which have long since been destroyed. Instead, we are concerned with the summaries which were prepared from such underlying documents. The summaries are obviously not regular entries in the course of business. They are not accounts receivables, inventories, expense records, etc. regularly entered by a business that are relied on in the conduct of the business. Nor are they business records of any other person since they were not prepared or kept by such other person.

In addition, a business record to be considered an exception to the hearsay rule should have been made contemporaneously with the event. Here the summary was allegedly made in 1949. The exhibits in question, however, are not the 1949 summary but Mr. Havemeyer's work product from such summary, and made by him in 1955 (Tr. 8016). They were prepared by him for use in the Bowman litigation rather than for use in business (Tr. 7674). Nor are they contemporaneous documents (although the 1949 summary may be) and they cannot be accepted as a copy of the 1949 summary without the 1949 summary being made available for comparison.

Complaint counsel also object to these exhibits on grounds of relevance, arguing that 1949 practices are not relevant to this proceeding which is concerned with 1965-1970 practices. This is a serious fault but may affect only the probative value of the exhibits rather than their admissibility.

Nor can these exhibits be admitted as market reports or surveys or published reports relied upon by the public or the industry. Instead, they are data compiled by Bowman, recorded by the predecessor firm to Case & Co., and kept by Case & Co. for the specific purpose of demonstrating Bowman's costs in 1949.

ORDER OF ADMINISTRATIVE LAW JUDGE

Accordingly, after intensive consideration of the arguments of A&P as well as of complaint counsel,

IT IS ORDERED that complaint counsel's objections to the reception in evidence of A&P exhibits for which the underlying data were not produced is sustained.

IT IS FURTHER ORDERED that complaint counsel will, on or before September 30, 1974, furnish counsel for the respondents a list of the exhibits or parts of exhibits so affected by this ruling.

Harry R. Hinkes
Administrative Law Judge

September 16, 1974

000118

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

DOCKET NO. 8866

IN THE MATTER OF

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,
a corporation, and

BORDEN, INC.,
a corporation.

VOLUME II

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING A&P'S COST STUDIES

ALFRED F. DOUGHERTY, JR.,
ASSISTANT DIRECTOR,
BUREAU OF COMPETITION.

JAMES T. HALVERSON,
DIRECTOR,
BUREAU OF COMPETITION.

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COUNSEL SUPPORTING
THE COMPLAINT.

COMPLAINT COUNSEL PROPOSED FINDINGS OF FACT

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COMPLAINT COUNSEL PROPOSED FINDINGS OF FACT

Volume II

A. The Havemeyer Cost Calculations

1. Three studies prepared:

Respondent A&P has offered three basic cost calculations in evidence in support of its defense of Count II of the complaint - the count charging A&P with the unlawful inducement or receipt of a discriminatory price. They are identified as follows:

(a) A profitability study designed to show that considering its May 1965 costs, Borden could have expected to make a substantial profit from the prices which it later accorded to A&P under the agreement.

(b) A comparison of Borden's cost of serving A&P stores and certain competing retail grocers served by Borden's O'Hare Branch in March 1966.

(c) A comparison of Borden's cost of serving certain A&P stores and certain competing retail grocers in Indiana in October 1969.

2. Prepared by Robert Havemeyer:

These studies were prepared by and under the supervision of Robert Havemeyer of Case & Company, Inc., New York, New York.

3. The Experience of the Preparer:

The witness' experience with Case and Company, and a predecessor firm, Stevenson, Jordan and Harrison, although partly involving work in the dairy industry, included only one other Robinson-Patman cost justification study presented in a litigated case - one of the ill-fated studies in U.S. v. Borden (Bowman), 370 U.S. 471 (1962). (Tr. 6769-6775, 9131-9132). 1/ In the main, the witness' experience has been in connection with studies for various state agencies, foundations and research groups. (Tr. 6769-6775, 9673, 9675, 9676-9677, 9678-9679; RAPX 245A, B and C). Such agencies are concerned with setting up standards for dairy pricing practices within their respective jurisdictions. (Tr. 6772, 6773; RAPX 9, pp. 9 and 10). He has also engaged in management consultant services for certain dairies, including Bowman Dairy of Chicago, Illinois (prior to its acquisition by Dean Foods Co. in 1966). (Tr. 7616-7617, 7962-7965, 8038-8040). Mr. Havemeyer's description of his experiences indicates that he has been principally involved in setting up broad costing "standards," such as those involved in the state milk pricing programs and management consultant work, (RAPX 9, 235A-C), rather than determining cost differences between specific competing purchasers under the Robinson-Patman Act. (Tr. 9131-9132).

1/ In this section most of the Tr. references will refer to the testimony of Mr. Havemeyer. Where this is the case the Tr. reference will not usually be preceded by the name of the witness.

4. Mr. Havemeyer's Calculations Were Offered to Rebut Evidence Showing Prices to A&P Were Discriminatory and Below Cost:

Mr. Havemeyer's three studies were intended to rebut evidence of record which shows Borden's pricing to A&P to be discriminatory and below cost. That evidence includes internal Borden cost accounting tabulations from both before and after the inception of the Borden - A&P contract, memoranda of contemporaneous internal communications within the Borden company, documents prepared by Borden and submitted to A&P during their dealings and the testimony at trial of various witnesses. (See Volume I, Finding 108-111).

5. Procedure Followed by Mr. Havemeyer:

Mr. Havemeyer's studies are not based upon personal observations of Borden's operations. (Tr. 7001, 8105, 8110, 8113, 7513-7514, 7730-7731, 7748-7750, 7891, 7979-7981, 7976-7979, 7980-7982, 7983, 8176-8177, 8270-8274, 7877, 7896-97). Rather, they are based upon a review of a portion of Borden's records which were "selected" by a Borden employee and "counsel," possibly A&P counsel. (Daube, Tr. 6704-6705). Mr. Havemeyer did not partake in the process, or even review all of the available documentation to determine the completeness and representativeness of the selection. (Tr. 7520). Nor did he obtain monthly documentation over a representative period of time to determine the typicalness and completeness of certain monthly cost data which he utilized in his studies. (RAPX 71 and 72; Tr. 7598, 7565, 7537). Moreover, he was frequently unable to answer basic questions concerning Borden's operational methods and the manner in which Borden's accounting records were compiled. (See Findings 9(l), 15(n) and 27, below).

In the main, where Mr. Havemeyer was shown, upon examination, to have no evidentiary basis for assumptions as to the identity, meaning, content, or impact of Borden's records, and as to the methods of Borden's operations, no attempt was made to substantiate Mr. Havemeyer's assumptions through the presentation of additional witnesses from Borden. This was so, despite the fact that ample opportunity was granted to A&P to call such additional witnesses. (Tr. 9144-9145, 9149). This would indicate that no substantiation was available for these points. Moreover, Mr. Daube of Borden was recalled in connection with a few of Mr. Havemeyer's "guesstimates" and opinions concerning the application and meaning of Borden's records, and failed to back up Mr. Havemeyer's interpretations in connection with a large share of the items covered by that testimony. [See Findings 9(c) (ii) n. 20, 9(f) (iii), 9(g) (viii), 15(a) (ix), 15(e) (i), 15(e) (ii), 15(e) (vii), 20(e) (i), 20(e) (ii), 20(e) (v), 20(g) (ii) and 22, below].

B. The Profitability Study

6. RAPX 232: 2/

This exhibit purports to calculate the total cost of processing, transportation to branches and delivery to the store, of A&P private label items, based on costs of Borden for May 1965 (although other periods were used in determining some of those costs). It then compares such cost to the private label price granted to A&P in September of 1965, to arrive at a calculated weighted margin per point for Borden in its sales of private label dairy products to A&P. It breaks down the total costs into seven categories: direct material costs; processing costs; trailer loading (at Woodstock plant); hauling to branches; truck loading at branches; delivery; and indirect marketing, general and administrative costs.

2/ This is the final "corrected" summary copy of this set of calculations. The original exhibits to which the witness' testimony refers are: RAPX 109-123, 140-152, 154, 198, 199 and 200 A-B. The findings and arguments herein will apply to RAPX 232 and these latter exhibits, as a group, unless it is otherwise specifically noted that one or more of these exhibits is not affected by a particular statement.

7. Purports to Show That Borden Overestimated Its Costs During The Negotiations:

This study purports to show that Borden's internal accounting, during the negotiations, overestimated its costs and that the ultimate prices granted to A&P in the September 21, 1965 offer (CX 62) provided a substantial profit margin to A&P. 3/ (RAPX 232, p. 96).

8. Mr. Havemeyer's Calculations Conflict With Borden's Contemporaneous Internal Accounting

Borden's internal accounting papers, prepared during the course of the negotiations, show higher cost figures than those estimated in respondent's exhibits. (CX 54B; CX 87A-C; RAPX 65).

9. Mr. Havemeyer's Calculations:

(a) Attachment I - Direct Material Costs: This portion of A&P's study represents the sum of three separate cost items -- raw milk cost, ingredients cost and container cost. The first two of these are taken directly from CX 54B - an internal document of Borden prepared in September 1965 and

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3/ Since it is impossible to determine delivery cost (one of the major functions involved) due to the fact that the witness did not present competent proof of the time involved in such function (see findings below under the "Delivery Cost" function) the exhibit is really inconclusive, even if it were otherwise valid.

listing certain costs in connection with the A&P private label negotiations. (CX 54B, CX 55). In the case of the third cost element in this calculation, container cost, the witness has ignored a figure given on CX 54B and referred to another exhibit listing certain costs for Borden's Wisconsin plants and for the period August 1964, a year earlier. (RAPX 232, p. 3; CX 4D; Tr. 7374, 7375, 7376).

In support of this latter selection, the witness stated that the expense as shown in CX 54B contained the Ex-Cell-O machine rental expense, which he argued should be considered in connection with processing expense. (Tr. 7376, 7379). He therefore selected the August 1964 expense in Wisconsin because this allegedly did not contain such rental expense. (Tr. 7379). However, he was unable to cite to any evidence showing what was included in the container expense as shown in CX 4 (Tr. 7380, 7381), or the container expense as shown in CX 54B (Tr. 7376, 7377, 7464-7465). Moreover, the witness has never cited to any support for this assumption, other than CX 4 and CX 54B [illegible]th of which simply refer to the expense of "container" without any further explanation or any indication that any additional expense is included. (CX 4E, CX 54B). It is far more probable that the difference in this cost item between the two exhibits is simply that there was a cost increase during the intervening year (CX 4 is based on August 1964 costs according to CX 4A-B; CX 54B was prepared in September 1965); or due to the fact that they were for different plants in different areas. (See RAPX 245B, Sec. II, pages 1 and 2 - last paragraph on page 1 and second full paragraph on page 2, beginning with "Readers will notice variations . . ."). 4/

The witness has, therefore, failed to establish an evidential basis for choosing an old cost figure from another plant in another marketing area, in preference to a more current figure applicable to the particular plant in question.

4/ Moreover, CX 4 was a cost study prepared for use in connection with a controversy with the State of Wisconsin and is, therefore, not entitled to the stature of a "business record" in connection with our deliberations in the instant matter. (Havemeyer, Tr. 6973-6974; Soberg, Tr. 2765, 2768; CX 4B). The Wisconsin matter included allegations of sales below cost. (Havemeyer Tr. 6973-6974, Soberg, Tr. 2767). It is obvious that such study would be prepared with the view of minimizing costs.

This particular error affects the calculations by the following amounts (See p. 4 of RAPX 232): 5/

Product	Additional Cost
Homo quart	$.001780
Homo 1/2 gal.	.002399
Homo gallon paper	.009067
2% 1/2 gal.	.002399
Skim 1/2 gal.	.002399
Skim quart	.001780
Buttermilk 1/2 gal.	.002399
Buttermilk quart	.001780
Chocolate quart	.001780
Half & half pint	.001337
Whip Cream 1/2 pint	.000686

(b) Attachment II - Processing Cost: Again, this item of expense was calculated by Mr. Malone in September 1965 for each of the items involved in the A&P negotiations.

5/ There is no end result for this exhibit since a number of the figures appearing on page 96 of RAPX 232 have been stricken because the witness has not produced any competent evidence to support his allocations of one of the principal expense items, delivery cost. However, the witness originally calculated a margin of only about $.017 per point. (RAPX 232, p. 96). Thus, it can be seen that even a difference of one or two mils is substantial.

(CX 54B). However, Mr. Havemeyer has chosen to ignore that informed calculation. Instead he goes through a very convoluted process wherein he bases the production expense at the Woodstock plant on calculations regarding such expenses at three other plants - one of which is not even identified. (See explanation of allocation below). Through this process he calculates a processing cost which is substantially below that calculated by Mr. Malone.

The procedures followed by Mr. Havemeyer in this calculation are as follows:

(i) Computation of Processing Costs Based On Experiences at Other Plants: The purpose of this calculation is to determine the production expense of Borden at its Woodstock, Illinois plant 6/, in May 1965. (RAPX 232, pp. 10, 96; Tr. 8161-8162). In making such calculations the witness based his computations on the Borden production expense at its two Wisconsin plants in August 1964. 7/ (RAPX 232, pp. 8-27; CX 4A-E). This was done despite the admitted fact that

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6/ The plant involved in the Borden - A&P contract. See CX 42A-D and Malone Tr. 124-125.

7/ The Wisconsin cost exhibit is continually referred to by the witness as "Milwaukee" costs (See RAPX 232, pp. 8 and 10). However, an examination of CX 4A-E, the document used by Mr. Havemeyer to obtain these costs, shows that they are actually average costs for the two Borden plants located in Madison and Milwaukee, Wisconsin. (See CX 4A, also see Tr. 6976, lines 4 through 6).

the witness was not shown to be familiar with either of the Wisconsin plants at the time in question and did not know how either of them compared to the Woodstock plant. (Tr. 6969-6971, 6971-6972, 6975-6976, 7001-7002, 8104-8105, 8110). In fact, he was not even familiar with the operations of the Woodstock plant. (Tr. 7001). Yet the witness admits that the ultimate ratio between the production costs of various products at Woodstock is based in large part, on the fact that he started out with a certain cost ratio in Wisconsin and built on that, in these calculations. (Tr. 8104, 8111; RAPX 232, p. 21 columns 2 and 11).

To a lesser extent such ratios are based upon the experiences of still another outside plant, which is as yet unidentified, Reuter Dairy, upon who's experiences the non-labor expense portion of this allocation was developed. (RAPX 232, pp. 13 and 14; RAPX 65; Tr. 8111). 8/

(ii) Components of the Witness' Calculations: In order to determine the May 1965 processing cost of the Woodstock plant, the witness began by determining the expense of producing the May 1965 production volume of each private

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8/ Ex-Cell-O machine rental cost allocations also play a more minor role in these differences, as will be noted below.

label item at the Wisconsin cost for each item. (RAPX 232, pp. 8, 10 and 21). He then subtracted out the non-labor cost (in a manner to be described below) to arrive at the Woodstock labor cost for these items at the Wisconsin labor rate (of August 1964). Next, he "determined" that the Woodstock labor expense was 143.759% of the Wisconsin labor expense. He then used this factor to transform the "Woodstock labor cost at Milwaukee's Labor Rate, Each Item" into the "Labor Expense at Woodstock Labor Rates Each Item." (RAPX 232, pp. 8, 10, 20 and 21).

After this procedure, he then added back in the non-labor costs for each item, which are determined on the basis of a "formula" related to the third outside plant, Reuter Dairy (which is as yet unidentified). He also added in the Ex-Cell-O machine rental costs (which again have not been determined through any study of the Woodstock plant), to arrive at the alleged "Total Expenditure at Woodstock, Each Item." This is then divided by the total number of each item produced at Woodstock in May 1965 to arrive at a "Unit Processing Cost, Each Item," which is the end result of this particular allocation. (RAPX 232, pp. 8, 9, 10, 21, 13-15, 18, 21; RAPX 154; RAPX 65; Tr. 8114-8118, 8131-8137).

(iii) Experiences of Wisconsin Plants Relative to the Spread of Expenses Over Product Line Not Shown to be Representative of Woodstock Experiences: Thus, the witness has used the experiences of the two Wisconsin plants to determine the allocation of production labor expenses to the individual products within the Woodstock product line. (RAPX 232, pp. 8, 10 and 21). 9/ In order to do so, there should be an evidential showing that the Woodstock plant and the Wisconsin plants had similar product lines; similar labor forces; similar equipment; similar utilization of that equipment; similar management problems; similar volume ratios among the product lines (including similar percentages of glass handled), similar filling machines; similar efficiencies in the operations of the fillers and other equipment; similar break-down records in connection with the equipment; and similarities in any other factor which could possibly affect the allocations of total labor costs to the individual items in the product line. (Tr. 8100-8103, 8104-8105, 8105-8110, 8110-8111). However, the witness admittedly did not rely on

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9/ The witness testified that Haskins & Sells had made a study of the Wisconsin operations to break out specific cost elements. (Tr. 6969-6980). This is not so, the Haskins & Sells "study" in this regard is simply a review of Borden's internal accounting records. (CX 4A-B).

any personal or evidential knowledge of any of these items. Furthermore, his responses to the questions which elicited this lack of evidential basis, showed that the factors involved are so variable that his calculations in this regard (applying total expenses to the individual products at Woodstock, based on Wisconsin experiences) are quite meaningless. (Tr. 8100 line 1, 8102 lines 10-14, 8104, 8105, 8108 lines 21 and 22, 8109 - paying particular attention to lines 6 and 7, 8109-8110 starting at line 25 on p. 8109, and 7001-7002).

(iv) Witness Admits That Error in the Wisconsin - Woodstock Ratio Would Materially Affect This Allocation: The witness admits that error in this ratio (used to apply the total expenses to the individual products, based on Wisconsin experiences) would materially affect his allocation of the production cost. (Tr. 8104 lines 21-25, 8110-8111 starting with line 23 on p. 8110 and reading through line 9 on p. 8111).

(v) Evidence Shows That CX 4, The Wisconsin Cost Exhibit, Not Applicable to the Woodstock Operation: As noted above, Mr. Havemeyer has not been able to show any relationship between the Wisconsin study, CX 4, and Borden's Woodstock cost experiences. Furthermore, the record contains clear and conclusive evidence that there is no such relationship. Joseph Malone, one of the Borden officials who submitted this study (CX 4A-E) to the Wisconsin authorities (Soberg, Tr. 2765-2768), and the Borden cost expert (CX 262, Malone, DTr. 11-13; 10/ Minkler, Tr. 111-112) has definitively stated in connection with CX 4A-E that "there is no relationship between the Chicago factors and the Wisconsin factors." (Malone, DTr. 36). 11/ There is no evidence of record which rebuts this assertion.

(vi) Mr. Havemeyer's Use of CX 4A-E Not Justified - His Allocation is Erroneous: In view of the facts stated above, Mr. Havemeyer's use of CX 4A-E is unjustified. Therefore, his allocations of labor expense at Woodstock are unsupported, unreliable and erroneous. They most certainly cannot be considered as reliable as the contemporaneously prepared cost projections of Borden's cost expert, Mr. Malone, who has determined a higher processing cost for these items (CX 54B).

10/ All references to "Malone, DTr." refer to the Malone Deposition Transcript which is in evidence in this matter as CX 262.

11/ Moreover, it must be remembered that CX 4A-E was prepared for Borden and submitted in connection with a controversy existing with the State of Wisconsin (Soberg, Tr. 2765-2768), so that it is akin to a document prepared in connection with litigation. It can be expected that all doubts therein were resolved in favor of Borden in connection with this controversy. That is, the document was designed to show that the discounts Borden was granting were justified (above cost) and that the differential between Borden label and private label were cost justified. (Soberg, Tr. 2767).

(vii) Use of RAPX 65 to Allocate Non-Labor Costs: The witness has subtracted out the non-labor costs and Ex-Cell-O machine rental costs from total costs. He allocated these costs to each item separately from the labor costs. (RAPX 232, p. 8, 10). The non-labor expenses are allocated to each item in accordance with a "formula" derived from RAPX 65, a document entitled "Borden Company Central District, Data Re: Reuter Dairy, Production Expense May 1965." The so-called "formula" used by the witness is simply this: For each item (quart homo., etc.) he takes the dollar figure given for "all other expenses" in column 5 of RAPX 65 and multiplies that by .86755 to obtain the "Calculated Actual Non Labor Expense, Exclusive of Ex-Cell-O Lease Expense." (RAPX 232, pp. 8, 10 and 14). The .86755 is the ratio of the "actual non-labor expense at Woodstock" (determined in the manner described below) to the total expense given at the bottom of column 5, on the second page of RAPX 65. He thus allocates the non-labor expense according to the manner in which this expense is assigned to each item for "Reuter Dairy," in much the same manner as he has allocated labor expenses to each item according to the experiences of the Wisconsin plants.

(viii) There Is No Showing Of The Relevancy Of RAPX 65: RAPX 65 was identified only through Mr. Daube, a Borden official, who could only say that this document had been found by someone else in Joseph Malone's files in Chicago. He stated further that he had seen documents of this general type (but not this document) previously and that part of the headings and certain entries thereon, not including column 5, were in Mr. Malone's handwriting. He specifically stated that he could say nothing concerning the purpose or reason for preparation of RAPX 65 or the figures in column 5. (Daube, Tr. 6709-6710; see also Daube, Tr. 6534-6535 in connection with a similar document).

In sum, there is no explanation in the record of the origin of RAPX 65 (or column 5 thereof), its meaning or its proper use. Neither Mr. Daube nor any other witness has been able to identify Reuter Dairy; although Mr. Daube knew that none of Borden's plants were called by that name. (Tr. 6709).

The only theory advanced by A&P is that columns 1 and 13 of RAPX 65 contain information identified as Woodstock product volumes and unit costs in RAPX 41 (which is itself unexplained) and CX 54, respectively. Even if this were so, it would not establish a relationship between the non-labor costs at "Reuter Dairy" and those at Woodstock. A&P argues further that the other data on RAPX 65, and particularly column 5, is an inextricable part of the determination of the unit cost figures in column 13. (Tr. 8048-8049). It is further argued that the figures in column 13 on RAPX 65 were obtained by dividing the figures in column 12 of that exhibit by the figures in column 1. It is established that some of the figures in column 13 correspond to unit processing cost figures given for certain items produced at Woodstock in CX 54B. (Tr. 8051, 7432, 7441-7442).

Even if all this is so, it does not support Mr. Havemeyer's allocations. There is still nothing in this exhibit (RAPX 65) or any other evidence of record, which establishes that any of this data, other than that in column 1 and possibly some data in column 13, relates to Woodstock. There is nothing to indicate that the "formula" referred to in this exhibit relates to any dairy other than that appearing in the title - Reuter Dairy. All of the rest of A&P's argument is pure surmise. It is clear that A&P has failed to carry its evidential burden of establishing the relevancy and meaning of this document. 12/

(ix) If RAPX 65 is Applicable to Woodstock, It Proves The Falsity Of The Witness' Calculations: Moreover, if RAPX 65 is relevant to the allocation of Woodstock costs, it completely disproves the calculations of Mr. Havemeyer. If A&P's explanation of this exhibit is correct (Tr. 8048-8051), then column 13 gives the total processing cost for each of the depicted products, at Woodstock, in May 1965. (The very thing Mr. Havemeyer is trying to determine through a convoluted process). Further, then columns 10 and 11 give the labor and non-labor expenses at Woodstock in May 1965. This is so, since the sum of these columns, column 12, is divided by column 1 (Woodstock production figures) to arrive at column 13 (which A&P identifies as Woodstock processing costs).

12/ The witness obviously knows nothing about this document since he mischaracterizes it as relating to a "rented dairy" (RAPX 232, p. 13 item 2, and p. 14 item 1) and to the "Tripp Ave." plant (RAPX 232, p. 13, in the title; Tr. 7442-7446), even though the only witness called to testify about this document did not know anything about Reuter Dairy or the purpose and meaning of this document. (Daube, Tr. 6709-6710). Without knowing these basic facts, Mr. Havemeyer's expertise in explaining its relationship to Woodstock is obviously nil.

This is even more apparent when the title over columns 10 through 12 is noted: "Actual Costs Allocated to Products on Basis of Formula Cost." (Emphasis added). 13/ This does not refer to "projected" or "anticipated" costs, but to "actual" costs. If they are related to Woodstock, they are the "actual" costs at Woodstock. And, if this is so, the entire premise of Mr. Havemeyer's allocation of both the labor and non-labor production expenses falls. He is then not allocating the proper expenses in the proper way, and Borden accounting records contemporaneous to the events in question have already computed out the costs he seeks, in the form he requires -- without going through the machinations discussed in items (i) through (viii) above and without relying on Mr. Havemeyer's "guesstimates" as to the total expenses which are allocable (as discussed below).

Thus, in either case the witness' allocation must fail. If RAPX 65 does not relate to Woodstock experiences, the premise of Mr. Havemeyer's allocation of non-labor expenses to each item is destroyed. If RAPX 65 does relate to Woodstock, it disproves not only his allocation of non-labor expenses, but also his allocation of the labor expenses, as well as

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13/ According to the testimony of Mr. Daube, who identified this document, the handwriting in this heading is that of Joseph Malone, Borden's internal cost accounting expert (Daube, Tr. 6709) who most certainly is far better qualified than Mr. Havemeyer to accurately interpret Borden's accounting records.

Mr. Havemeyer's selection of the allocable expenses involved in production at Woodstock. 14/

(x) Mr. Havemeyer's Use of "Actual" Woodstock Processing Costs: Mr. Havemeyer has referred to Borden's expense ledgers and selected certain costs as representing the Woodstock processing costs (Account 730-40, RAPX 71) in connection with several steps in his allocation of "processing cost per item." First, he subtracts out the "non-labor" costs for separate allocations. He then uses the "Woodstock Actual Labor Expense" to set up a ratio with the Wisconsin labor expense, in order to factor up the latter expense to represent the "Labor Expense at Woodstock Labor Rates, Each Item." Third, he uses the "actual" non-labor expense at Woodstock to set up a ratio with the so-called "formula" cost in column 5 of RAPX 65, which ratio he uses to reduce the "formula cost" for each item to the "All Other Expense At Woodstock, Each Item." Lastly, he selects an expense representing the Ex-Cell-O machine rental expense (Account 703-41-408, RAPX 71) and allocates this to each item in accordance with a formula of his own devise. (RAPX 232, pp. 8, 10, 21-24).

14/ An examination of RAPX 65 shows that the "actual" costs depicted in columns 10-12 are much higher than those used by Mr. Havemeyer in RAPX 232, p. 13.

(xi) Mr. Havemeyer's Determination of "Actual" Woodstock Processing Costs Is Deficient: The record reveals that Mr. Havemeyer's analysis of Borden's expense accounts, in this regard, is so shallow and incomplete that it is fatally deficient. The witness has examined just one month's expense ledgers (RAPX 71) and has made no inquiry into the typicalness and completeness of the various debits and credits shown therein. [Tr. 7598, 7520, 7599 lines 13-18, 7564-65, 7562-7563 (which show that all of Borden's ledger expenses in RAPX 71 were not utilized in his calculations - this is further borne out by a comparison of RAPX 71 with the accounts referred to in RAPX 232), see also, Tr. 7520-7521, 7537, 7594-7595, 8033-8034 (no showing of any check into inventory records to determine the effect of inventory changes on processing and other expenses)].

Further, a glance at accounts 730-40 and 703-42, used by the witness, will show that they include no supervisory expense. (See RAPX 71, Accounts 730-40 and 703-42; also see the chart of Accounts RAPX 67, account 703-42 - Woodstock production expense, which lists sub-account No. 1 as supervision expense.) Obviously, there must be some supervisory expense involved in the processing function. In other similar situations where such supervisory expense is not found in an account, Mr. Havemeyer has gone to other accounts to find this expense. (Tr. 7607, 8387, 8388; RAPX 233, pp. 15-17). Another obvious expense item is building expense; which is not found in any of the expense items utilized by the witness. (RAPX 71, Accounts 730-40 and 703-42).

Despite these facts, Mr. Havemeyer attempts to take issue with Borden's internal accounting expert who had the necessary "rapport" 15/ with those records to be able to spot quite easily any entries of an atypical nature, any seasonal or periodic accounting adjustments, any adjustments due to inventory changes, and any additional accounts which might have a bearing on a particular expense item. (Minkler, Tr. 111-112, 309-310; Malone, DTr. 149 lines 15-18; RAPX 65; CX 54B). It is obvious under these circumstances that Mr. Havemeyer's analysis of Borden's records cannot be given any weight, when they are in conflict with the internal accounting determinations of Borden's cost accounting expert

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15/ Mr. Malone noted that he had reviewed the elements of cost that pertained to Borden's business and had exercised cost accounting judgment based upon his "rapport" with Borden's cost experiences. (Malone, DTr. 149).

(made contemporaneously with the events in question and for the internal use of Borden management). 16/

The deficiency of Mr. Havemeyer's analysis is brought home very forcefully by reference to his own written instructions to dairy plants in Wisconsin, in a manual prepared in connection with the Wisconsin dairy trade laws. There it is explicitly mandated that in reporting costs, "a period of sufficient length should be selected to cover cyclical and seasonal fluctuations but yet represent

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16/ There is even some doubt in this instance as to whether Mr. Havemeyer has used the right account. Account No. 730-40 is listed in RAPX 68 (a list of location numbers for May 1965) as a Chicago main office account; Location 703 is listed there as the Woodstock location number. RAPX 67, a chart of accounts for March 1966 (in which there are changes since May 1965), lists location 703-42 as the Woodstock processing costs. The May 1965 account sheets (RAPX 71) includes both account 730-40 (used by the witness) and account 703-42. Account 730-40 appears to include a summary of the subaccounts from 703-42, along with two additional entries. (Tr. 7690-7698). The witness theorizes that 730-40 is a "clearing account" wherein charges are accumulated for one reason or another and then posted to other accounts (Tr. 7698); although he admits he has not been able to completely reconcile these two accounts. (Tr. 7692-7696). However, even if his theory is correct, it only points out all the more that his analysis of the Borden accounts is inadequate. It is clear, under these circumstances, that he can not look at only the one location identified on the chart of accounts as the source of the processing or some other costs. A much deeper analysis and understanding of Borden's records is required. The record makes it clear that only Mr. Malone had the benefit of such understanding and analysis.

current methods. The month in which the price action occurred that triggered the complaint or investigation must be included." (Tr. 9135-9136). Similar admonitions are given in other parts of this manual. (Tr. 9134-9135). Mr. Havemeyer has clearly broken this rule in the present case. 17/

Under all of these circumstances, the witness' determination of the "Actual" Woodstock processing costs is deficient and unreliable.

17/ The witness tries to avoid the obvious logic of this rule by arguing that the Wisconsin manual is directed toward a study of current operations, as compared to the present study which is concerned with past operations. He implies that records for a greater period of time were unavailable to him. (Tr. 9142-9143). However, in one instance where there was a question about the application of depreciation expense to the loading account for May 1965 (Account No. 703-37), the witness obtained records for this account for the additional months of June through December 1965. (See CX 301). There is no reason given of record why records for the other accounts could not have been obtained for at least a similar period of time.

(xii) The First Ex-Cell-O Allocation Was Rejected: The allocation of the Ex-Cell-O machine (filling machines) rental cost was originally made in accordance with a formula developed from a 1967 study made by Case & Company (Mr. Havemeyer's firm) for an unidentified private client. (Tr. 6992). This formula was rejected because the witness did not submit substantiating evidence to show its competence and relevance. (Tr. 7397, 7402, 7393). Consequently, this method of allocation was rejected as being unsubstantiated.

(xiii) The Alternate Method of Allocating Ex-Cell-O Costs (RAPX 154) Is Admittedly Defective: Subsequently, the witness devised an alternate method of allocating Ex-Cell-O machine rental costs - RAPX 154. (Tr. 8114-8118). The witness described his methodology in this allocation as being "of an averaging nature." In comparing it with his original method, he stated "the method I did originally -- we tried to determine the costs of the Pure-Pak [Ex-Cell-O] lease for each of the specific products rather than just average it over some basis. I believe my original method is a superior method." (Tr. 8117). He further stated "... I don't believe it is as correct a method because it is of an averaging nature, ..." The witness further admitted that the amount paid per point for machine rentals varied according to a number of factors, including size of the container, speed of the machine, model number of the machine, and age of the machine. (Tr. 8132-8134). The witness further admitted that these variables are the reasons "why I considered the method which I used in my report [original method] to be a superior method for allocating Pure-Pak rentals." (Tr. 8134).

Thus, the witness has admitted that the alternate method of allocating these costs is defective. Furthermore, he admits that the alternate method resulted in a slight additional cost to Borden for the 11 private label items and, consequently a slight lessening of the profit margin which the witness has computed for Borden in this set of exhibits. (Tr. 8117; RAPX 154). Therefore, the manner of allocating this cost is important. Under the circumstance, Mr. Malone's informed allocation of this cost in CX 54B and RAPX 65 must be considered vastly superior to this witness' "averaging method," which is obviously no better than a guess.

(xiv) Mr. Havemeyer's Selection of Ex-Cell-O Expenses Is Deficient: The witness has used the allocation method found in RAPX 154 to allocate the sum of $10,480.90 taken from Borden Account No. 703-41-408. (Part of RAPX 71). This selection is again based solely upon an examination of the May 1965 Borden expense ledgers. (RAPX 71). However, he admits that the Ex-Cell-O machine rental consisted of two parts - a base rental and a production rental. (Tr. 8131-8132 starting with line 25 on p. 8131 and going through line 3 on p. 8132; also see 8133 lines 2 through 8). The base rental was paid on a monthly basis. (Tr. 8133). But, the witness admits that the production rental may have been on a quarterly basis, or some other basis, other than monthly. (Tr. 8133-8134). Mr. Daube, the witness from Borden who was called to authenticate the Borden account records, was unable to tell just what was included in Account No. 703-41. (Daube, Tr. 6743-6744).

Therefore, it is admittedly very possible that a substantial portion of the machine rental costs were not included in RAPX 71. Again, the witness' failure to make a sufficient analysis of Borden's cost experiences, over a representative period of time, is fatal to his results.

(xv) Neither the Amount of Expenditures Nor the Allocations to the Individual Products Are Reliable: Consequently, neither the expenditures selected by the witness, nor the manner in which each of these categories of expenses have been allocated to the individual products are reliable. The amounts of the expenditures are based on an inadequate analysis of the Borden expense records. The allocations to products are based upon experiences at completely different plants, without any showing of relationship or, in the case of machine rentals, upon an averaging basis without foundation in the record, which even the witness doubts. (Supra).

In the face of all these deficiencies, it is obvious that the internal accounting determinations of the Borden cost expert, made contemporaneously to the time period in question, must be considered the only reliable evidence of such costs in the record. (CX 54B; see also RAPX 65, column 13).

(xvi) Errors in Allocating Processing Costs Are Substantial: The differences between Mr. Havemeyer's allocations of processing costs and those of Mr. Malone are substantial in the context of the witness' calculations. They require the following adjustments:

Product	Difference
Homo Paper Gal.	$.009286
Homo Half Gal.	.007181
Homo Quart	.003450
Chocolate Quart	.001222

Buttermilk Half Gal.	(.006409) 18/
Buttermilk Quart	.004886
2% Half Gal.	.009239
Skim Half Gal.	.005537
Skim Quart	.002512
Half & Half Pint	(.003057) 18/
Whipping Cr. Half Pint	(.005699) 18/

It is impossible to tell with exactness, the complete impact of the effect of such differences on the witness' calculations, since the end result of those calculations has been excluded (due to the lack of competent evidence to support some of the witness' allocations). However, when these adjustments are made in Mr. Havemeyer's weighted average margins (where the homogenized milk items account for about 74% of the sales) they reduce the "weighted margin per point" substantially by about 16%. (RAPX 232, p. 96). This is based upon the witness' original calculation, which has been excluded from evidence, as noted above.)

18/ In the case of three of the lesser volume items (buttermilk half-gallons, half and half pints, and whipping cream half-pints) Mr. Malone actually calculated out a lower cost. The over-all impact, however, is to raise the "weighted costs" substantially, since the homogenized milk items alone account for almost 74% of the total volume of these 11 products. Moreover, this is really indicative of the intent and error in Mr. Havemeyer's methodology. Through his convoluted methods of allocating expenses to the individual products, he has shifted costs from the principle products covered by the Borden-A&P contract to the lesser items, most of which are not included among the products covered by that contract.

(xvii) Effect When Combined With Errors In Container Costs: Moreover, when this error is combined with that on container costs, supra, it can be seen how these seemingly small errors quickly mount up. The two together result in a reduction in the "weighted margin per point," as originally calculated by Mr. Havemeyer, of better than 4 mils per point (out of a total of $.0169 calculated by the witness). Thus, these two items alone represent a reduction of over 24% in the "profit percentage" as calculated by the witness. 19/

(c) Attachment III - Trailer Loading: In this attachment the witness has calculated the number of cases loaded and shipped at Woodstock in May 1965, the number of cases per pallet and the cost per pallet. He then derived the loading cost per case and per unit from the cost per pallet. The total "loading expense" used by the witness in his cost calculations was taken from RAPX 71, the May 1965 Borden expense ledgers. The account number he selected therefrom was Account 703-037, which is listed in the March 1966 chart of accounts (RAPX 67) as the Woodstock "loading expense." (RAPX 232, pp. 28-34).

19/ Such conclusory figures of Mr. Havemeyer have been excluded from the record, as noted above.

(i) The Witness' Selection of Loading Expenses is Deficient: Again the witness has made only a superficial book audit of this expense account to determine the full measure of Borden's expenses incurred for this item. There was no inquiry into Borden's operations to determine whether this one account contained all of the expenses related to this function. (Tr. 7520-7524). Again, the expense allocated by Mr. Havemeyer is lower than that allocated by Mr. Malone, who had a "rapport" with Borden's records and operations. (Compare CX 54B and RAPX 232, p. 29).

(ii) Obvious Discrepancy As To Depreciation Ignored: The superficiality of Mr. Havemeyer's approach is well illustrated by the question of depreciation which was raised during the examination. It was pointed out that the May 1965 account (703-037) used by the witness did not have any depreciation expense listed. (Tr. 7522; RAPX 71, Account 703-037). It was further pointed out that this same account for March 1966 did contain a substantial entry for depreciation. (Tr. 7521-7522; RAPX 72, Account 703-037). His only explanation of this discrepancy was the "supposition" that Borden used old pallets from closed plants, which pallets were fully depreciated and that Borden had purchased new pallets by 1966. (Tr. 7522-7523). 20/ This just does not accord with the evidence of record.

The Woodstock plant was a new, modern, innovative plant, with many new technological improvements. (RAPX 129 and 130). One of those new technological improvements was palletization. (Pergler, Tr. 5698; Malone, DTr. 24-26; Minkler, Tr. 98-101). In fact the Woodstock plant was one of the few palletized plants in the country. (CX 19-G).

20/ He also justified his position by noting that the Borden accounting statement did not show any depreciation. (Tr. 7523). Later A&P recalled Mr. Daube, a Borden executive, and asked him if the Borden accounting statements for May-December 1965, under account No. 703-037, "reflected any depreciation charged to loading expense?" He answered simply "There is no depreciation charge for this account." (Daube, Tr. 9184-9186). However, this does not indicate there was no depreciation expense; only that none was reflected in this account. Mr. Daube noted further that there were changes in Borden's accounting system between May 1965 and March 1966. (Tr. 9208). In connection with other expense items, Mr. Havemeyer himself looked to other accounts when an obvious expense item was missing from a particular account. (See e.g., Wholesale delivery supervision expense allocation in RAPX 233, pp. 15-17, Tr. 8387-8388; Branch loading expense for O'Hare vendor, etc. sales taken from wholesale route account 723, RAPX 233, pp. 10-11; Tr. 8257-8261; also see Tr. 7607). The facts noted hereinbelow show that he should have done so in this case, also.

Moreover, respondent's own exhibit, RAPX 40, belies Mr. Havemeyer's statement. This exhibit is the "Proposal" for the construction of the Woodstock plant. That proposal noted that "Practical operating considerations prevent the utilization of existing machinery and equipment in the new plant because of the necessity of having the new plant operating before the old plant is shut down." (RAPX 40, p. 9). It also noted that some construction work at the branch loading facilities was necessary to accommodate palletization. (RAPX 40, p. 9). Further, it lists the cost of "new rear doors for 94 trailers and 50 wholesale trucks to provide for pallet loading," (RAPX 40, p. 24), and shows that 4,964 pallets must be purchased at a cost of $3.50 each, for a total annual cost of $5,791.00 to "be amortized on a 36 month basis." (RAPX 40, p. 23). [This latter figure fits in well with the depreciation figure in the March 1966 Borden Expense accounts (RAPX 72, Account 703-037), especially when it is also noted that the loading process utilized 11 fork lift trucks which would also have to be depreciated (RAPX 129, page numbered 32).]

(iii) No Building Expense Allocated to Loading Function: Moreover, Mr. Havemeyer's superficial book audit of this account (703-037) failed to consider any building expense which was allocable to the loading function. Again, there is no such item in the Borden expense account for trailer loading (RAPX 71, Account 703-037), but it is obvious that some building expense would be entailed.

The descriptions of record for this plant indicate that a substantial portion of the South end of the Woodstock plant is devoted to the loading function and transport dock. (RAPX 130, numbered page 69; RAPX 131, pp. 9 and 11).

(iv) Witness' Determination of Cost Not Reliable In View of Malone Computation: A comparison of the Malone allocation of trailer loading expense in CX 54, with that of Mr. Havemeyer in RAPX 232, p. 29, shows that Mr. Malone was allocating a greater amount of expense, than was Mr. Havemeyer. In view of Mr. Malone's intimate knowledge of Borden's accounting procedures and his ability to spot any atypical entries, or any related expenses which were not included in a particular account, it is quite obvious that the Malone expense selection is far more reliable than the uninformed, mere book-audit of Mr. Havemeyer. 21/ It

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21/ Mr. Havemeyer attempts to discredit Mr. Malone's computation of this and certain other items on CX 54B, on the basis that Mr. Malone allocated the same expense to gallon glass containers as he allocated to gallon paper. (Tr. 8160-8161). This criticism is based primarily on the fact that there were more gallons of paper in a case than there were of glass. However, there were also more cases of glass gallons on a pallet (Pergler. Tr. 5632), and although this does not quite equalize the number of units per pallet, there may have been other economies involved in loading the glass gallon pallets of which Mr. Malone was aware. The accusation that Mr. Malone was "averaging" is pure supposition in view of the fact that Mr. Havemeyer admittedly has no personal knowledge of the loading process. (Tr. 7513, 7514, 7001, 8105, 8113). As for the fact that Mr. Malone's loading cost for the gallon container was twice the half-gallon and the half gallon was twice the quart (see Havemeyer criticism on Tr. 8161), a glance at Mr. Havemeyer's own results on RAPX 232, p. 29, shows the same relationship between containers, when the slight rounding off of figures is taken into account.

is clear from Mr. Havemeyer's own analysis that the Borden accounts are set up for Borden's own accounting purposes and not for the purpose of a study such as this one. (Tr. 7599; RAPX 71; RAPX 72). This witness admitted that in order to understand just what was included within a particular account, "You would have to go to an expanded definition of the accounts . . . ." (Tr. 7523). Yet, it is clear that Mr. Havemeyer did not go beyond these particular entries for any "expanded definition." He admitted that he did not make any check to determine if all loading expenses were included on this particular page of Borden's records. (Tr. 7520). Under such circumstances, his analysis must be deemed deficient, in comparison with an internal cost accounting calculation of the Borden company expert, estimating higher costs for this function. 22/

(v) Other Elements of Mr. Havemeyer's Computations Are Unfounded: The witness' calculations are based on the assumption that only full pallets of each item were shipped

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22/ RAPX 65 and 41 give the total production volume of Woodstock for May 1965, in Malone's handwriting. (Daube, Tr. 6706, 6709). These are the same volumes used by Mr. Havemeyer in his allocations. (RAPX 232, p. 32). Thus, it is clear that when you apply higher unit costs for this function to the same number of units that it will result in higher overall costs.

from Woodstock. (RAPX 232, pp. 32, 33). Yet, a casual inspection of the data used by Mr. Havemeyer belies this assumption. (RAPX 232, p. 32, column headed "Cases" - pallets held 30 cases each, except for gallons glass which held 36). Mr. Havemeyer admitted that few, if any, of these items came out to full pallets. (Tr. 7519-7520). The witness admitted further that there would be some additional expense involved in mixing product on a pallet to make full pallets in such cases. (Tr. 7516-7517). 23/ Any such additional expense was not taken into account. (Tr. 7517).

He also estimated the number of pallets in the case of bulk items. (RAPX 232, pp. 31, 32, and 34). There is absolutely no record foundation for such assumption and the witness has not been shown to have any familiarity with palletization techniques. An overestimation of the number of pallets would decrease the cost of trailer loading. (RAPX 232, p. 33). [See also, Finding 9(d)(iii) below.]

23/ He did opine, without foundation, that such additional cost would be miniscule. (Tr. 7516-7517). Of course, he had not observed this loading function. (Tr. 7513-7514).

(d) Attachment IV - Hauling to Redistribution Points: In this attachment the witness has calculated the number of cases transported from Woodstock to the redistribution branches and the hauling cost per case and per unit for this transportation. There is again serious question as to the amount of hauling expense "selected" from Borden's expense accounts and some of the assumptions and calculations of the witness are either erroneous or without foundation.

(i) The Hauling Expense Used By Mr. Havemeyer Is Inaccurate: Mr. Havemeyer selected the expense for this function from two separate accounts - Account 703-71 (automotive expense) and Account 703-74 (transport milk). Aside from his failure to determine the typicalness and completeness of the entries in these accounts, as described in connection with other accounts above, he has also been inconsistent in his selection of expenses out of these two accounts.

These two accounts, just as many of the other accounts in RAPX 71, include some entries for the first few days of June. (The period covered was not on a strict month basis.) In the case of Account 703-71 (and other accounts used in other portions of his calculations, e.g. delivery expense Account 723-23), the witness accepted the account, as is. (Tr. 7603-7604). However, in the case of Account 703-74, he has deducted $3,824.13 in expenses, since they were listed as June '65. (RAPX 232, p. 39; RAPX 142, pp. 92-97; Tr. 7534, 7535-7536). Therefore, the witness has inconsistently, and without reason on the record, eliminated almost four thousand dollars in expenses from this function. (Tr. 7603-7604).

(ii) The Witness Has Again Failed to Make Adequate Study of Borden's Accounts: Again Mr. Havemeyer was not able to show any familiarity with the make-up, typicalness, and completeness of the various entries in these accounts. One month was chosen and the entries were accepted as they were shown in that account, without anything more. (Tr. 7537-7538). He was not even aware of the exact time period covered by these accounts. (Tr. 7535-7536). He did not know whether certain credits were typical or atypical (Tr. 7537) and he admitted that there was no automotive depreciation included in Account 703-71, (entitled "automotive expense") while there was depreciation reflected in Account 703-74. (Tr. 7538). The chart of accounts indicates a sub-account for depreciation in both accounts. (RAPX 67).

Mr. Malone did not compute a cost for the hauling function, so there is no yardstick to judge the witness' results against. 24/ However, it is clear that he has omitted almost $4,000 in expenses. It is equally clear that his selection of other expenses, under the circumstances outlined above, is unreliable.

(iii) Other Assumptions and Calculations In Connection With This Function Are Unreliable: The first three steps in this calculation are the same as those in connection with trailer-loading (the last function, above) wherein the number of cases and pallets loaded and shipped out of Woodstock in May 1965 were calculated. (Tr. 7527; RAPX 232, pp. 28, 31-33, 35-37). Therefore, the questions raised above in Finding 9(c)(v), concerning the accuracy of the determination of the number of cases and pallets applies here as well. (See also, Finding 9(d)(iii) below.)

24/ This is one of a number of cost omissions from Mr. Malone's computations in CX 54B. It should be remembered that Mr. Malone prepared CX 54B to determine only the direct costs in Borden's dealings with A&P, in order to determine the level at which competitive bids may have been made to A&P. (See CX 55.) Therefore, it was not his purpose to include all costs involved in Borden's operations.

(e) Attachment V - Truck Loading at O'Hare Branch: In this calculation the witness has used the O'Hare Branch of Borden as typical of the operations of all branches of Borden's Chicago Metropolitan Region. (RAPX 232, pp. 40-74). He has then estimated the number of cases loaded onto trucks at O'Hare and the loading cost per case, per point and per item. The calculated cost of this function at O'Hare is then applied to sales to A&P out of all the branches. Again, Mr. Havemeyer's calculations are based on a deficient analysis of accounts, and defective assumptions and computations in connection with basic cost components.

(i) The Witness' Selection of Costs Is Deficient: As in the case of the other functional costs noted above, the witness' analysis of Borden's expense records is too shallow. He has again used only one month's experience and reviewed only one account, with no real analysis to determine completeness and typicalness. (RAPX 71, Account 723-37; Tr. 7561-7565). He admittedly has not determined the typicalness of substantial credits in this account (Tr. 7564-7565), nor allocated any building expense to this function (Tr. 7562-7563). Nor has he allocated to this function other obviously related expenses such as storage and labor supervision. (RAPX 232, p. 44; RAPX 71, Accounts 723-37, 723-8 and 723-4; Tr. 7563-7564). Mr. Havemeyer's only excuse for such omissions is that they do not appear in the truck loading expense account. (Tr. 7563, line 22). As noted above, however, in other calculations he has gone to other accounts to find missing expenses which obviously should be applied. In fact, in this very same calculation of truck loading expense, he notes that you must go to Account 723-37 (which he used), to find the truck loading expenses for locations 724 and 725 (vendor sales and bulk wholesale), since there is no separate loading expense for these locations. (RAPX 142, p. 111; RAPX 232, p. 44). It is clear that Mr. Havemeyer accepts the Borden expense accounts at face value, with no interpretation or analysis, only when it most suits his purpose. 25/ His selection of costs for this function is clearly deficient.

(ii) Mr. Havemeyer's Estimate Of The Number of Cases Loaded On Trucks At O'Hare Is Deficient: The witness has calculated the "total cases loaded onto trucks at O'Hare, 5th Period 1965" in several steps. First, in a worksheet appearing previously in connection with "trailer-loading" and "transportation to branches" (see Findings 9(b) and (c), above), he has calculated the average number of points per case shipped from Woodstock to O'Hare. (RAPX 232, p. 43). Next he has subtracted out the "estimated sales to O'Hare 'counter' customers." (RAPX 232, p. 42). The "estimated"

25/ It is also clear that the witness has not followed his own mandate form the Wisconsin dairy trade manual, which requires a study of accounts over a representative period of time. (Tr. 9135-9136).

number of cases of such counter sales is, in turn, based upon Mr. Havemeyer's belief as to the type of products included in those sales (as will be more fully discussed below) and is calculated on RAPX 232, p. 42. In both the calculation of the number of points per case shipped out of Woodstock and the analysis of "counter" sales, Mr. Havemeyer's work reveals serious deficiencies.

(iii) There Is Insufficient Foundation For the Witness' Estimation of the "Average Points/Case Shipped From Woodstock": As noted in Findings 9(c)(v) and 9(d)(iii), above, the witness' analysis of the number of units per case and number of cases per pallet of some of the products involved is without adequate foundation and is, therefore, defective. The "estimated" number of containers per case, points per case and cases per pallet for bulk containers is given on pages 31 and 32 of RAPX 232. The source for these estimates is a "Case & Company analysis" which does not appear in the record. (See footnote on RAPX 232, p. 31). There is no Borden record in evidence showing the number of units per case, or the number of cases per pallet for most of such items. (See RAPX 78.) Mr. Havemeyer has not been shown to have any expertise in the palletization process and has not been shown to have any personal knowledge of Borden's practices at the locations in question. Similarly, there is no evidence of record of the number of containers of cottage cheese per case, in the instance of the large size containers - 90 lb., 96 lb. and 100 lb. containers. (RAPX 41 and 78).

Further, the calculation of number of points per case is without foundation, since a number of items are not listed in the supporting Borden record from which the point values were derived. (Tr. 7547-7550; RAPX 232, pp. 31-32; RAPX 66, p. 7).

(iv) His Determination of the Number of Cases Involved In "Counter Sales" Is Also Unreliable: The witness admits that the nature of the "Counter Sales," (most of which were to Great Lakes Naval Training Station) that is, whether they were bulk items, regular items or a mixture of both, can have a substantial impact on the number of cases loaded and the ultimate results of his calculation. (Tr. 7550-7552). Yet, his testimony makes it quite clear that he hasn't the slightest idea what type of products are included in such sales. (Tr. 7550-7554). Therefore, his calculations cannot be considered reliable in this regard.

(v) The Witness Did Not Study Possible Cost Differences Between Loading Regular Wholesale Items And Bulk Items: Related to the last two items above, is the question of the relationships between the costs of loading the various different classes of product handled at O'Hare. The records show that there were 14 bulk whoelsale routes and 24 regular wholesale routes operated out of O'Hare in May 1965. (RAPX 76, p. 3). It may well be that the cost of loading bulk items was substantially lower than the cost of loading regular wholesale items. One fact would point to this as a probability -- the fact that there were so few bulk items as compared to the regular wholesale items. (RAPX 41; 65; and 232, pp. 31 and 32). Yet, Mr. Havemeyer has allocated this cost on a straight per case basis without regard to whether the items were "bulk" or "regular." (RAPX 232, pp. 42-44). At the same time, he admits that no study was made of the cost of handling bulk items at O'Hare, as compared to the cost of handling other items. (Tr. 7559-7560). This, too, must be regarded as a serious defect in his study.

(vi) Mr. Havemeyer Hasn't Considered Palletization And The Mixing of Product on Pallets For A&P, In His Calculations: Mr. Havemeyer's calculations also ignore the fact that these products were loaded by pallets, rather than on a by-case method. (Pergler, Tr. 5642; contrast RAPX 232, pp. 42-44). This is material since it was noted by Mr. Pergler that, in the case of A&P private label products, it was often necessary to mix pallets of A&P label and Borden label together on a pallet, to make up a full pallet. (Pergler, Tr. 5697-5698, 5700, 5702-5704). It was also noted that when a pallet was mixed, that this had to be done by hand by the loaders. (Pergler, Tr. 5698, 5707). Obviously, this involves extra effort and extra expense. Yet, Mr. Havemeyer, through ignoring the palletization process in his allocation of the expense of this function, has ignored this extra expense in the handling of A&P private label products. 26/ His calculations are, therefore, unreliable in this regard.

(vii) Mr. Havemeyer Assumes Without Record Basis, That All Branch Operations Have The Same Product Mix: Mr. Havemeyer also admits that his calculations are dependent in part on his assumption that each of the redistribution branches served out of Woodstock, as well as the areas served by trailer-runs, had the same product mix. (Tr. 7556). He admits further that it is possible that this is not the case. (Tr. 7557). Further, CX 17 indicates that the A&P stores in

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26/ Mr. Havemeyer insists that this mixing of product on pallets was done equally for everyone. However, as noted above, Mr. Havemeyer has not personally observed this procedure (Tr. 7980) and the only testimony of record (Mr. Pergler's) regarding such mixing relates primarily to A&P product. Mr. Havemeyer's unsupported "guesstimate" cannot overcome substantial evidence of record.

different areas varied in their purchases of various items, especially in the high point value by-products. Of course, the higher the incidence of high point value by-products the higher the point value per case, and vice versa. Therefore, this is further indication that the points per case calculation of the witness is unreliable.

(viii) The Estimated Average Points Per Loaded Case Is Based Upon "Judgment": The witness summarized A&P sales on O'Hare routes in March 1966 and calculated an "average points ordered per case" and then, based in part upon several "judgments," transposed this figure into an "estimated average points per loaded case." (RAPX 232, p. 45). This latter figure was then divided into a calculated figure representing the "loading cost per case," to arrive at a "loading cost per point" for A&P stores. (RAPX 232, p. 74). One of the "judgments" involved in this process was to increase the "average points ordered per case" on the part of the biggest volume item, the half-gallon homo., from 23.8896 to 24.0 in determining the "estimated average points per loaded case." (RAPX 232, p. 45). Such rounding-off was not done for any other item, although there were increases between the 2 columns on this sheet insofar as other items were concerned where the items were combined in a single case. (RAPX 232, p. 45). Although this may only slightly change the results, it is a deliberate misstatement of fact on a major item. When combined with the other faults in the computation of branch loading cost, it is further evidence of the unreliability of this allocation.

(f) Attachment VI - Delivery Cost: In this attachment the witness has calculated the anticipated cost of delivering each item to the A&P stores within the O'Hare Branch. (RAPX 232, pp. 75-89). The O'Hare Branch is again considered to be representative of the cost experiences of all branches served out of Woodstock, as well as those other areas served by "trailer-runs." (RAPX 232, pp. 76, 96 and 97).

An examination of Mr. Havemeyer's cost data in RAPX 232, shows that this is the largest and most important expense item, with the exception of direct material costs. (RAPX 232, p. 97). 27/ It is also the area of the most distortions and inaccuracies in Mr. Havemeyer's calculations. His selection of costs is again one of the basic deficiencies. He has also failed to substantiate a number of basic assumptions and misallocated substantial amounts of expenses. Moreover,

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27/ See also CX 54B.

he has mixed data from different time periods to such a degree that any conclusions to be derived therefrom are defective. Finally, he has failed to produce competent evidence to support his assumptions as to "time-saving" in the Borden-A&P sales. Therefore, he has failed to establish on the record any conclusion as to the cost of this most important function.

(i) Expenses Utilized By The Witness: The witness has used two sets of expense data in this calculation. First, he has referred to Account 723-23, the O'Hare delivery expense account and selected certain expenses therefrom as representing "Physical Delivery Expense, Except Automotive." Then he has taken certain costs from RAPX 69, as representing the automotive costs for the "Chicago Metropolitan Region, Excluding Hammond." In each case, the witness' selection of expenses is deficient, as is noted below.

(ii) Mr. Havemeyer's Analysis of the Physical Delivery Expense Account Is Deficient: In the case of the delivery function Mr. Havemeyer has again reviewed only one month's expense account and made no study of the typicalness nor completeness of the entries therein. (RAPX 232, pp. 78-79; RAPX 142, pp. 151-154; Tr. 7598, 7599, 7604, 7596-7606, 7608-7612, 7912). The voir dire examination revealed that at least one item of expense - supervision - is admittedly missing from this account. (Tr. 7607). 28/ The chart of accounts (RAPX 68) and the delivery expense account (RAPX 71, Account 723-23) reveal also that there is no building expense included within this account. Yet, there had to be some building expense incurred in connection with the function. In fact, in a related study, RAPX 233, the "Cost Analysis O'Hare Branch, March 1966," Mr. Havemeyer has gone to another account (723-008) to obtain building expense in connection with this function. (RAPX 233, pp. 15 and 16). A thorough and proper study of Borden's delivery practices and Borden's expense accounts may well have revealed additional missing expenses. These two are only the ones that are made apparent by Mr. Havemeyer's own, very limited study.

Moreover, it is shown by Mr. Havemeyer's testimony (Tr. 7598, 7599, 7604, 7596-7606, 7608-7612, 7912) and by the underlying documentation (RAPX 71) that Mr. Havemeyer has again not followed his own instructions to Wisconsin Dairies (from the Wisconsin dairy trade manual) to study

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28/ The witness admitted that there would be this additional expense. (Tr. 7607). He admitted further that in other instances where such expense was missing from an account, he went to another account to find the expense. (Tr. 7607). In the identical situation in the witness' study of the O'Hare Branch for March 1966, he has gone to Account 725-23 to obtain a supervision expense. (RAPX 233, pp. 15-17).

these accounts over "a period of sufficient length . . . to cover cyclical and seasonal fluctuations but yet represent current methods." (Tr. 9135-9136). Under these circumstances, his analysis of the physical delivery expense is defective.

(iii) He Has Omitted Certain Delivery Expenses Without Foundation: In has analysis of Account 723-23, the witness has without foundation, excluded certain costs as not being applicable to A&P. He has deducted almost $2,500.00 in expenses labeled "travel expense" and "other expenses," whereas the record shows that a substantial portion of this expense should have been included in his calculation. 29/

In the case of travel expense, the witness opined that it could not be the expense of the routemen, since this was covered elsewhere. Therefore, he reasoned that it must be for the salesmen. (Tr. 7608). He did not believe any of it could be in connection with route supervision, since his experience indicated that supervisors usually go out in spare route trucks (Tr. 7608-7609). He admitted he had no direct knowledge of Borden's practice in this regard (Tr. 7609). His experience was proven unreliable when

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29/ There is another expense which he has deducted, product waste, which also fits in this category, but it is treated separately, below.

when Mr. Daube, a Borden executive, was recalled to substantiate Mr. Havemeyer in this and other respects. Although on direct Mr. Daube stated that "Travel Expenses" in this account represents the traveling expenses of the salesmen (Daube, Tr. 9181), he admitted on cross-examination that to the extent the travel of Mr. Pergler (the branch manager) was included in this sub-account that it includes travel in connection with any of his functions related to delivery on the store wholesale routes. (Daube, Tr. 9216, lines 13-21). Mr. Pergler was the branch manager and performed supervisory functions at the O'Hare branch, as well as some sales functions. (Pergler, Tr. 5627-5629; Daube, Tr. 9211). Thus, a portion of this "Travel Expense" must be attributed to supervisory travel and has not been properly deducted. 30/

The deduction of the category "Other Expenses" (Sub-Account 50) involves similar error. The witness based this deduction on the statement that a number of the entries in this sub-account were listed as "Petty Cash" and Mr. Pergler's testimony that petty cash was not used on behalf of A&P. (Tr. 7611). However, it was admitted that only three entries (totalling only $599.07 out of a total expenditure of $2,024.81) were

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30/ Over one-third of the "Travel Expense" represented Mr. Pergler's travel. (Tr. 7609-7610).

identified as "Petty Cash" on the Borden expense account. (Tr. 7611-7612). Again Mr. Daube was recalled to substantiate Mr. Havemeyer's use of this sub-account and again he failed to substantiate him. When asked what account 50, entitled "Other Expenses," included, he stated "It would relate to other costs not detailed in the other details relating to delivery expenses for store wholesale accounts." (Daube, Tr. 9182). This covers a very broad gamut of possible expenses. It is clear that the only portion of "Other Expenses" which might be considered as not applicable to A&P was that portion identified as "Petty Cash." The bulk of these expenses should have been included as a part of delivery expense.

(iv) Mr. Havemeyer's Determination of Automotive Expense Is Unreliable: As noted above, the witness also included an "automotive" expense in his calculations of delivery cost. This was not obtained from the Borden expense accounts, but rather from another "summary" document-RAPX 69. Moreover, it did not pertain only to the O'Hare branch, as did the physical delivery expense, but was applicable to the entire Chicago Metropolitan Region, with the exception of Hammond. (RAPX 69). The witness first stated that he had used this braoder-based record because it was all that was available. (Tr. 7619-7620). But he later admitted that there was an automotive expense account in RAPX 71 for the O'Hare Branch. (Tr. 7624-7628). He admitted further that if he had been consistent and had used the O'Hare Branch data, as in the case of the physical delivery expense, that it would have raised the "Automotive Cost per Route Day" from $16.20 to $18.90. (Tr. 7628).

Mr. Havemeyer argues, in part, that the data for the entire Metropolitan Region (excluding Hammond) was preferable to data for only the O'Hare Branch. (Tr. 7623). However, this ignores questions as to whether the cost data is really comparable as between the Borden expense account (723-71 in RAPX 71) and the summary document he used (RAPX 69) and as to whether his "estimated operating days" (See RAPX 232, pp. 80-81), used to compute the number of route days on regular wholesale routes, is accurate. (RAPX 232, p. 80).

In this connection, the witness has information regarding the number of regular wholesale routes in relation to the number of school routes in the O'Hare Branch. (RAPX 74 and 76). However, with the entire Chicago Metropolitan Region there is no such information available. There may have been additional school routes at the Holland Road Branch and other branches (RAPX 76); this would reduce the number of "operating days" and result in an increase in the cost per route day. (RAPX 232, p. 80). More importantly, there has been no explanation of RAPX 69 on the record, nor of Account 723-71, the O'Hare automotive expense account (part of RAPX 71 - the expense accounts). RAPX 69 is strictly a summary document, with very broad categories of expenses and only one lump-sum entry under "automotive expense" (despite additional headings on the sheet). It is quite possible that the expense account ledger sheet (RAPX 71) is more inclusive as to the expenses covered. Without some explanatory comparison on the record from a knowledgeable witness, there is no way to tell. Thus, the witness' calculation of the automotive cost per route day is without adequate foundation.

(v) If the Calculation of Automotive Cost Per Route Day is Correct, it Casts Further Doubt on the Calculation of Physical Delivery Expense: Moreover, if the witness is correct in his calculation of the automotive cost per route day, and in his argument that the Region figures are preferable to those for the O'Hare Branch, then he casts still further doubt on his earlier assumptions that the O'Hare route is representative and can be used to illustrate costs throughout the entire Region. This is obvious, since if the data in the record regarding automotive costs for both the Region and O'Hare

are comparable, then the O'Hare Branch admittedly experienced a 17% higher cost for this function than did the entire Region of which it was a part. (Tr. 7628). Mr. Havemeyer cannot have it both ways, either the data is not comparable or the areas are not comparable. Either way, his basic cost data is defective.

(vi) All Expenses Allocated on Basis of Time Spent at Store: Mr. Havemeyer has allocated all expenses which he has lumped under "Physical Distribution Expense" on the basis of the time the driver spends at the individual stores. (RAPX 232, p. 75). This is incorrect since some of the costs which he included in this category of expenses bear no relationship to the time the driver spends in the stores.

(vii) Commission Expenses are Incorrectly Allocated on a Time Basis - Commission's Can Not Give Rise To A Cost Saving: Mr. Havemeyer has allocated all expenses which he has categorized as physical distribution expense, on the basis of the time the driver spends in serving the individual stores on his route. The record establishes beyond doubt that commissions are earned and paid on the basis of volume delivered; not according to the number of hours worked, or the time spent on serving the stores. (Pergler, Tr. 5731-5732;

Banaski, Tr. 9560; CX 119 J-K; CX 298 H-J; CX 299 H-K; CX 300 H-J). Mr. Pergler testified at Tr. 5732:

> The Commission that the routemen received was based on their sales, not on the time that they put in at an individual store on an entire route

In questioning on Tr. 5732-5733, he added:

> Q. This was strictly a percentage of sales?
>
> A. They got a commission on sales, yes.

During the cross-examination of Mr. Banaski, the Indiana dairy employees union representative, it was established at Tr. 9560:

> Q. Pursuant to the terms of these agreements, the wholesale drivers were paid both a salary and a commission? (Emphasis added)
>
> A. Right.

Finally, the union contracts specifically note that the wholesale milk truck drivers were paid a salary (determined on an hourly, daily and/or weekly basis), plus a commission based on the number of points delivered on their routes. (CX 119 J-K, N-O, Articles 41 and 42A; CX 298 H-J; CX 299 H-K; CX 300 H-J).

Mr. Lemberg, Complaint Counsel's expert on Robinson-Patman type cost-justification studies, stated that Mr. Havemeyer's method of allocating commission expense, on the basis of the time the driver spends in serving each store, is erroneous. He pointed out that commission's were not earned or incurred on this basis. (Lemberg, Tr. 9405, 9434-9436). He stated that the proper method of allocation was to attribute it to the volume delivered. (Lemberg, Tr. 9405). Further, Mr. Lemberg noted that if it were so allocated, this would remove any cost saving (that is lessening of the cost of serving A&P) which had resulted from Mr. Havemeyer's methodology. (Lemberg, Tr. 9408). This is so, because such commissions should then be applied equally to every point delivered on the route. [Under Mr. Havemeyer's method, more of this cost was applied to non-A&P customers where his time estimates indicated that a greater amount of service time was expended, proportionally, for other customers (RAPX 232, p. 75; RAPX 142, p. 168; RAPX 180)].

Thus, almost a third of the total expenses allocated in this section of RAPX 232 are erroneously applied so as to produce an alleged cost saving to Borden on sales to A&P. This methodology would shift Borden's cost of serving A&P stores onto A&P's competitors, since, regardless of who it is credited to, Borden must pay a certain commission on the points delivered to A&P. Under these circumstances, Mr. Havemeyer's allocation of this expenss is certainly in error.

(viii) Route Automotive Expense Also Erroneously Allocated on Time Basis: In like manner, Mr. Havemeyer has allocated the route automotive expense on the basis of the time spent by the driver in serving the stores on his route. (RAPX 232, pp. 75, 78, 87-89, 76). Again, such methodology is erroneous. This expense is simply and clearly not accrued on this basis.

Mr. Lemberg pointed out that automotive expense "is not related to the time that the driver spends at the store." (Lemberg, Tr. 9408). He added that "It is rather related to the load carried, the miles driven and factors of that kind . . . the truck is used merely to bring the product to the store and therefore it should be equally allocated to each unit of the product." (Lemberg, Tr. 9408-9409, 9447, 9451). 31/ He added that "this would remove any cost difference in the allocation of the delivery expense." (Lemberg,

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31/ On cross-examination Mr. Lemberg was questioned concerning other possible methods of allocation, such as the mileage driven. He stated that this method would be arbitrary, since the amount of mileage to any particular customer on the route would be accidental and based solely on the physical layout of the route. (Lemberg, Tr. 9446, 9448). He noted that vehicle expense is "just a general expense which is related to getting the milk out to the customer and relates to the product generally." (Lemberg, Tr. 9448). He noted further that this expense is "incidental to the volume because it has to be hauled around the route." (Lemberg, Tr. 9448-9449).

Tr. 8409, 9447). Of course, this means that the savings determined by Mr. Havemeyer in connection with this portion of his allocation of delivery expense are also erroneous.

The automotive costs per route day represent almost 20% of the total cost per route day being allocated by Mr. Havemeyer under this function. (RAPX 232, p. 78). Thus, this error involves a substantial allocation. This again reveals the unreliability of Mr. Havemeyer's computation.

(ix) No Reliable Foundation For Sales Figures For Non-Store Customers: The sales figures for schools and other non-store customers, as utilized by the witness on page 89 of RAPX 232, are based upon assumptions concerning an olio of location and sales data covering three different time periods. (RAPX 232, p. 89; RAPX 142, pp. 147 and 165; Tr. 7796-7805). The atypicalness of some of the data used, plus the fact that substantial changes had occurred in Borden's distribution set-up between the earlier and later time periods, make Mr. Havemeyer's sales figures for these customers unreliable.

It should be remembered in this context that the costs to be determined and the sales data to which they are to be applied, are for May 1965. The witness' first step in the derivation of these costs was to determine the number of such stops (schools and other non-store) on the "average" O'Hare route in March 1965. (RAPX 142, p. 147; Tr. 7787-7789). He then made a survey of sales data from the route books for two out of 17 O'Hare routes during two weeks in March 1966. (RAPX 142, p. 165; Tr. 7798-7803, 7805, 7833-7836). 32/ This survey was used to determine the sales points per route day, points per case, points per stop and cases per stop for these classes of customers. (RAPX 232, pp. 89 and 86). This data was applied to May 1965 cost data. (RAPX 232, p. 89). Thus he has used May 1965 expenses, March 1965 route structure and March 1966 sales data.

The March 1966 sales data, however, has not been shown to be representative of the two 1965 time periods, nor even of the March 1966 time period. He has studied only two routes containing only six out of 37 schools and seven out of 22 "other non-store" customers served by the O'Hare Branch in 1966. No checks were made to determine the representativeness

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32/ The witness states that a survey of three routes was made. However, he later admitted that insofar as schools and other non-store customers were concerned, that only two of those routes served these types of customers. (Tr. 7805).

of the six schools and seven "other non-store customers." (RAPX 232, p. 86; Tr. 7808-7809, 7811, 7811-7813, 7833-7836). Thus, we don't know if the sales points per route day, points per case, points per stop and cases per stop figures on RAPX 232, p. 89, are typical of these classes of customers, way below average, or way above average.

Furthermore, the witness admits that the route set-up of the O'Hare Branch had been changed between the Spring of 1965 and the Spring of 1966. (Tr. 7805). In fact, whereas RAPX 74 showed one school and .87 "other non-store customers" per average route in March 1965 (the figures used by the witness in Column A on p. 89 of RAPX 232), in March 1966 the record shows there were over two schools, and more than one "other non-store" customers on the "average" O'Hare route. (Tr. 7807-7808).

In view of these circumstances, Mr. Havemeyer's determination of the number and sales characteristics of the schools and "other non-store" customers must be considered unreliable.

(x) Sales Data for Non-A&P Stores Unreliable: Similarly the sales data for non-A&P stores is unreliable for the same reasons -- that is, he has used data covering three separate time periods, March and May 1965 and March 1966, without any showing that the data for one is representative of the other. (Tr. 7817-7820). As a matter of fact there is no record basis for any of the figures used for this category of customer. All sales figures are "estimated." (Tr. 7820). The witness has taken RAPX 74, which gives the number of non-A&P store customers in various product brackets for March 1965, and estimated that in May 1965 those customers purchased the middle volume figure in that bracket, except for the bracket purchasing over 300 points per day. 33/ (Tr. 7817-7818). In the largest bracket, he took the sales volume to three customers purchasing in that category in March 1966, and "assumed" that the 11 Eagle Stores would purchase about the same volume as an average A&P store, which he estimated at 510 points per day, and averaged these sales figures to arrive at a sales volume of 442.1 points per day. (Tr. 7818-7820). Thus, outside of the sales data for the three independent stores for March 1966, there were no actual sales figures that went into the computation of the sales data for the customer category "other stores." Despite these facts the witness applies such data, based on a mixture of March 1965 and March 1966 data, to the sales of May 1965, as being representative of that period. (Tr. 7821-7822).

33/ For example, in the bracket purchasing 99 points or less, he estimated 50 points purchased per day, and in the bracket purchasing 200-249, he estimated 225 points purchased per day.

(xi) The A&P Sales Data is Unreliable: In view of the two preceding items, the A&P sales data on RAPX 232, page 89 must also be considered unreliable. In the case of A&P sales, the sales points per route day in Column B of page 89 (RAPX 232) are derived by subtracting the total of the sales points of schools and other non-store customers and "other stores" from an "estimated" sales figure given on RAPX 74 for March 1965. (Tr. 7825-7826, 7827-7828, 7821-7822). The A&P sales are then just the residue after the sales to other categories of customers are deducted from an "estimated" total sales figure for March 1965. Therefore, they can be considered no more reliable than the other sales figures from which they were derived.

Moreover, in computing the sales points for A&P, the witness did not make any volume analysis of those A&P sales, similar to the various volume brackets given for "Other Stores." (RAPX 232, p. 89). This is so, despite the admitted fact that 10 out of the 88 stores listed in the March 1965 breakdown of the O'Hare sales (RAPX 74) took less than 300 points per delivery. This too, must be considered a defect in Mr. Havemeyer's assumptions.

(xii) The Calculation of Number of Points Per Case For "Other Stores" is Unreliable: 34/ The witness has calculated the number of points per case in May 1965 for all "Other Stores," regardless of their purchase volume bracket, as 22.0 points per case. (RAPX 232, p. 89 Column C). This was based upon a two week analysis of the route books for three out of 17 routes in March 1966. The witness admitted that all sales were lumped together for all "other stores," regardless of purchase volume. (Tr. 7845). He admitted further, that since he had only analyzed three out of 17 routes "there was not sufficient data to be certain of a variation of the points per case by size of store." (Tr. 7845). He also admitted that it is highly unlikely that these various sized stores purchased the same number of points per case (which is in turn decided by the number of items taken of various types of merchandise divided by the number of items per case). (Tr. 7850). However, he excused this defect on the basis that ". . . the data was not there

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34/ The calculation of this figure for schools and "other non-store" customers was noted as being unreliable in Finding 9(f)(ix), above. In the case of "other stores" and A&P private label sales, the number of points per case is treated separately from the analysis of the points per stop and other volume figures, since additional errors are involved.

unless you went through a tremendous analysis." It is clear that this 22.0 figure is not representative of any class of independent store competitor. 35/

(xiii) The Calculation of the Number of Points per Case For A&P Private Label is Unreliable: The number of points per case for A&P private label, as it appears in Column C of page 89 of RAPX 232, was worked out on a hand calculator and recorded on page 161 of RAPX 142. (Tr. 7851). Therefore, there are no underlying calculations available that can be checked for accuracy. However, this does not mean it must be accepted. In fact, Mr. Havemeyer's testimony shows that the figure is erroneous.

This figure was derived from the total anticipated sale of the 11 private label items, as such volumes were set out in CX 62, Borden's final offer to A&P. (Tr. 7851-7852). Treating this volume as one entity (or one big delivery), he determined the number of cases and average points per case that would be involved in these anticipated sales. (Tr. 7851-7852, 8167-8168). The witness admitted that his calculations of the 25 points per case for A&P private label was "based upon the concept that in

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35/ As will be noted more precisely in connection with Mr. Havemeyer's other cost studies he has consistently failed to identify A&P's competitors by their different customer classes. He assumes that the very smallest of the independents have the same customer characteristics as the very largest. This practice is a substantial error on his part.

each case, in the case of deliveries to each [A&P] store, all of the cases will be filled, and there will be no partial cases delivered to any A&P store." (Tr. 7858).

Yet, the witness has also admitted that his own analysis showed that frequently there were less than full case deliveries on a number of these items to the A&P stores. (Tr. 7852). In fact, his analysis actually reveals that the number of points per case in such deliveries to A&P stores was substantially below 25 points per case. (Tr. 7853-7856; RAPX 142, pp. 115-142). He argues that this latter analysis is not accurate insofar as points per case is concerned, because of the "rounding off" of the number of cases. (Tr. 7855). However, this does not answer the real point in this line of questioning, which was the treatment of the anticipated A&P sales as sales to one giant customer. The sales were actually to be made to a great number of individual stores, none of which apparently exhibited the characteristic presumed here by the witness (25 points per case). (Tr. 7852; RAPX 142, pp. 115-142).

Thus, the points per case calculated by the witness for A&P private label, just as those calculated for other categories of customers (as noted above), are unreliable.

(xiv) All of the Witness' Basic Data on Page 89 of RAPX 232 is Therefore Unfounded and Unreliable: In view of the facts set out in Finding 9 (f) (ix through xiii) the basic sales data found on page 89 of RAPX 232 must be considered to be without substantial basis in fact. (See also Tr. 7931, lines 15-24). Moreover, Findings 9 (f) (ii through v) show that the cost data going into the "Route Day Cost" as shown on page 89 of RAPX 232 is incomplete and unreliable. Therefore, the data remaining [36] on this key delivery expense worksheet is all defective and unreliable.

(xv) All Time Data Has Been Excluded: Of course, there has not been any allocation of physical delivery expense to the various categories of customers in Mr. Havemeyer's calculations, since the "time standards" on which his original allocations were based have been excluded. (RAPX 232, pp. 89 and 76). This exclusion was due to the witness' failure to produce competent evidence to substantiate such "standards." (Order Supplementing and Modifying Order of September 11, 1974 Re Mr. Havemeyer's Cost Justification Exhibits, dated September 16, 1974).

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[36] It must be noted of course, that most of the basic data on this key page (in the calculation of delivery expense) has already been excluded, because it was not supported by competent evidence (the time related data).

(xvi) Comparison of Excluded Conclusions With Malone Cost Data: In view of the fact that the ultimate conclusions of Mr. Havemeyer for the cost of this function have been excluded, any meaningful comparison is impossible. However, as to the principal items, the gallons, half gallons and quarts of milk, the delivery costs originally calculated by Mr. Havemeyer are less than half the cost calculated by Mr. Malone. (See RAPX 232, p. 76; and CX 54B, "Delivery Man & Truck"). This difference, in and of itself, is more than enough to eliminate the slight profit which Mr. Havemeyer originally calculated for Borden in his profitability study.

(g) Attachment VII - Indirect Marketing, General and Administrative Cost Per Point: In this attachment the witness has allocated a number of costs under the general heading of indirect marketing, general and administrative costs. He obtains those costs from CX 54B -- the Malone workpaper which has been referred to above in comparison with a number of the other allocations of Mr. Havemeyer. From such costs he deducts a number of cost items which he determines are "not applicable to A&P private label business." Then he analyzes four cost items which he determines are only partially applicable to the A&P private label business. (Branch clerical expense, credit and collection expense, general sales overhead, and "other" delivery costs). Next, he decides how much of these latter expenses were not applicable to A&P private label and deducts this also to arrive at the "Indirect Marketing, General & Admin. Cost Per Point." (RAPX 232, p. 90).

(i) CX 54B Not Prepared to Show Such Costs: CX 54B was a worksheet prepared by Joseph Malone, Borden's cost accountant on September 1, 1965, in the latter stages of the Borden-A&P negotiations. (CX 54B). It was prepared to inform Borden management of the direct elements of cost that applied to the various items covered by this schedule. [Malone, DTr. 146, 147 (lines 18-21), 148, 252-253; CX 55]. It is obvious from an examination of this exhibit and CX 55, a related memorandum, as well as the deposition of Mr. Malone, that there was no attempt to accurately reflect these overhead and burden costs in this worksheet. [See Malone, DTr. 147 (lines 12-21), 149-150, 155-157]. In fact, they are not even limited to the experiences of Borden in the Chicago Metropolitan Region, but are based upon the entire volume of Borden in the Central District. (Malone, DTr. 155-157). Borden's Central District went far beyond the area of our concern, and included plants located in Madison and Milwaukee, Wisconsin, Pekin, Illinois and Cedar Rapids, Iowa, in addition to the Woodstock plant which is involved in this case. (Minkler, Tr. 105-107; Malone, DTr. 21, 22).

Therefore, the average figures for such items as credit and collection, branch clerical and delivery supervisional salary cannot be considered as accurately representing those in the areas covered by A&P's Chicago Unit. Obviously Borden's experiences would vary somewhat on these items from place to place and from time to time. [See Borden accounting records reflecting per unit costs for a number of these items, such as credit and collection, advertising, selling and administrative expenses, which vary on the basis of month, year and area being covered. (RAPX 73; RAPX 80; RAPX 90, p. 2)]. Mr. Malone had no need to determine these figures accurately, since it was not the purpose of this exhibit to deal with "overhead and burden" costs. (Malone, DTr. 147, 155-157). However, in a study with the purpose of Mr. Havemeyer's, greater particularity is required. His reliance on these figures, therefore, renders his calculations defective.

(ii) The Complete Deduction Of Certain Expenses Is Unjustified: Mr. Havemeyer, as noted above in the introductory paragraph of Finding 9(g), deducted a number of items which he decided were "not applicable to A&P private label business." (RAPX 232, p. 90; Tr. 7714-7715). These items included national advertising, local advertising, merchandising and "other income and deductions." (Tr. 7714-7715). The complete deduction of such expenses is unwarranted on the basis of the record in this case.

First, the advertising expenditures must be considered, in part, a general expense of doing business related to Borden's entire operation. Its purpose was to maintain and increase volume in the Borden plants. To this extent its benefits were applicable to all volume out of the Borden operations, whether branded or not. (See analogous argument relating to selling expense, Mr. Lemberg, Tr. 9416-9417, 9419). This is especially true in the case of A&P since it was the only customer who was then on a "cost plus" basis with Borden. (CX 62 U-Z-2; Minkler, Tr. 275, 276; Gose, Tr. 1076, 1090-1091; CX 120-152; RBX 1-5, which show the first cost-plus offers to others being made in 1968). Thus the maintenance and improvement of Borden's economies of scale were basic to the ability of Borden to continue to serve A&P under the contract. 37/

In the case of merchandising, there is again insufficient record support for the complete deduction of this expense. The record does not adequately explain just what expenditures are included under this term. Mr. Havemeyer was not able to cite to any evidence to show that at least one allocable item,

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37/ In this regard, it is important to note that the contract was terminable at the will of either party. (Tr. 1722-1723).

promotional allowances, was not included in this amount. (Tr. 9769-9733). 38/ The record shows that A&P did receive promotional allowances on both Borden label and private label products. (CX 303 A, B and H).

The expenses included within "other income and deductions" are totally undefined. (Tr. 7714-7715). There is no basis whatsoever for the exclusion of this expense, in whole or in part, from those applicable to A&P.

(iii) The Elimination of the Greatest Part of Certain Other Expenses Is Unjustified: Next the witness has subtracted the lion's share of four other categories of expenses - branch clerical, credit and collection, general

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38/ He did insist that Borden's bookkeeping procedures led him to believe that the promotional allowances would appear in revenue, rather than expenses. (Tr. 9769-9771). But he admitted that he could not check out all of the billings against the revenues and expenses, since he did not have all of the billings. (Tr. 9771). He admitted further that one bookkeeping method would take the promotional allowance data out of revenue and put it back into the expense account. (Tr. 9772). Finally, he admitted that over and above the reduction in revenue attendant on such promotional allowances, there would be an expense involved in developing and administering the sales promotion program. (Tr. 9773). This then, would obviously appear in Borden's expense account and would be applicable to A&P private label sales.

sales overhead and "other" delivery costs - as not being allocable to A&P. (RAPX 232, p. 90). These deductions are also either clearly erroneous, or not substantiated by the record, as is noted in the next several paragraphs below.

(iv) *He Has Erroneously Subtracted Three-Quarters of the Branch Clerical Expense From His Calculations*: Mr. Havemeyer has allocated the branch clerical cost "on the basis of delivery tickets since the principal function of Branch Clerical is the handling of these delivery tickets, *or one of the significant functions at least of Branch Clerical* is the handling of delivery tickets." (Tr. 7716, See also Tr. 8144-8145). (Emphasis added). The witness *calculated* the percentage of delivery tickets represented by A&P private label sales and arrived at a figure of 25%, which was then his estimation of the percentage of the clerical expense allocable to A&P. (Tr. 7716-7730). Even disregarding a number of infirmities in this latter calculation 39/, this percentage figure bears little relationship to the manner in which this expense was incurred or to the benefit from or responsibility for this expense. (Lemberg, Tr. 9414). As Mr. Lemberg pointed out, clerical costs are not related solely to the delivery ticket, which is the theory upon which the methodology outlined above relies. (Lemberg, Tr. 9414). Clerical costs undoubtedly also involve such other functions as inventory control, maintenance,

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39/ As an example of such infirmities, the witness admitted that a substantial portion of the customers on the O'Hare routes (which he has frequently used as being representative) were daily cash-paying customers who did not generate a delivery ticket. (Tr. 7732). Further, Mr. Havemeyer's own testimony reveals that there were more delivery tickets, and more processing of tickets, involved in A&P sales than in those to others. He admits that in the case of A&P there were individual daily slips for each store and that these slips were, additionally, summarized on an area and weekly basis. (Tr. 8484-8486). Thus, the individual store daily delivery tickets had to be processed first and then they had to be summarized into a weekly billing slip by area. (Tr. 8486). Neither of these facts were considered in his determination of the percentage of delivery slips represented by the private label sales. (Tr. 7716-7730). Furthermore, he does not take into account the fact that there were at least 11 more lines on the March 1966 A&P summary billing than there were on billings to other customers. (RAPX 232, p. 91). At that time A&P was purchasing the 11 private label items under both A&P and Borden label. (RAPX 142, pp. 115-143).

operation of the vehicles, payroll, selling expenses and other clerical functions. (Lemberg, Tr. 9414). A number of these items would bear far more directly on volume, than on the number of lines on a delivery ticket. (Lemberg, Tr. 9415). By Mr. Havemeyer's own calculations A&P represented over 55% of Borden's wholesale sales volume and at least 75% of the A&P volume was represented by the private label items. (RAPX 232, p. 91). Thus, the methodology used by Mr. Havemeyer (allocation on the basis of delivery tickets) clearly understates A&P's share of the branch clerical expense. 40/

(v) Mr. Havemeyer Has Erroneously Subtracted Three Quarters of the Credit and Collection Expense from his Calculations: The credit and collection expense has been calculated by the witness in the same manner as the Branch Clerical expense. The expense amount has been taken from among the overhead and burden expenses in the lower half

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40/ Of course, such inaccuracies are in addition to the basic inaccuracy mentioned in Finding 9(g) (i), above, that the figure for this expense, as taken from CX 54B, is not representative of Borden's branch clerical expense in the Chicago Metropolitan Region, or the O'Hare Branch (whose sales he used in this calculation). Mr. Havemeyer admitted that the figure on CX 54B was an "average branch clerical cost," and therefore, not necessarily the clerical cost for the O'Hare Branch. (Tr. 7731). His reliance on the fact that it was used in Borden's calculations on CX 54B is misplaced. As noted in paragraph (g) (i), *supra*, this exhibit was not really concerned with the "overhead and burden" expenses, but was designed to single out the direct expenses for the guidance of Borden management. (See CX 55).

of CX 54B and the percentage figure for that portion "not applicable to A&P private label" (75%) is obtained from the same analysis of delivery tickets as was made for Branch Clerical Expense. (Tr. 7737, 7716-7731). As noted above in footnote 39, the billing process was more involved for A&P than for others. (Tr. 8484-8486).

Most importantly, however, this is a "credit and collection" expense, not a "billing" expense. Inherent to such an account is the fact that it is related to "credit" customers. Those who do not utilize this service certainly should not be charged for it. Mr. Havemeyer has admitted that a substantial portion of Borden's customers purchased on a cash basis. (Tr. 7737, 7732). They should not be included in this calculation. Furthermore, the best measure of credit and collection expense is the dollar amount of credit extended, not how many delivery slips that are made out. In view of the fact that A&P purchased on credit and its volume represented over 55% of Borden's wholesale sales (including those made to daily cash basis customers) it is quite evident that far more than 25% of this expense is allocable to A&P. 41/

41/ Again, these faults are in addition to the basic unreliability of the cost figure itself. As noted in Finding 9 (g) (i), above, the figure for this expense, as taken from CX 54B, cannot be considered to be representative of Borden's Chicago Metropolitan Region, or its O'Hare Branch.

(vi) 90% of the General Sales Overhead Has Been Erroneously Deducted: In this calculation the witness has taken the August 1964 salaries and expenses of Borden connected with "selling, advertising and merchandising" private label products in the Wisconsin Region, and divided this dollar amount by the number of wholesale points sold by Borden in the Chicago Metropolitan and Eastern Iowa-Central Illinois Regions in June 1965, to determine the amount of such expenditures, on a per point basis, which would be applicable to A&P private label sales. He then divides this expenditure by the "General Sales Overhead" figure given in CX 54B to arrive at a percentage figure of 8% (which he rounded off to 10%), representing the percentage of "General Sales Overhead" applicable to A&P private label sales. (RAPX 232, p. 93). 42/

Mr. Havemeyer has mixed sales and expenses from different areas and different time periods to such a degree that his calculations and assumptions are replete with error. First, as a source of basic information utilized in his calculation,

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42/ It is important to note that here Mr. Havemeyer does concede that some portion of Borden's sales expenditures apply to A&P private label. Whereas in the O'Hare and Hammond studies (RAPX 233 and 234) he insists that none of these expenses apply to such sales.

he has relied upon a document which has not been authenticated and is not in this record. He refers to CX 4-O, yet CX 4 contains only pages A through E. (RAPX 232, p. 93). Although additional pages were in this exhibit as originally proposed, none were ever authenticated or offered in evidence. Furthermore, even the "General Sales Overhead" figure which he used from CX 54B has not been shown to be representative of the Chicago Metropolitan Region, as is noted in Finding 9 (g) (i), supra.

Most importantly, the calculation of the percentage of this expense allocable to private label is simply erroneous. The mixing of different areas and different time periods makes this calculation totally incomprehensible. Mr. Havemeyer uses a dollar expenditure for the Wisconsin Region for August 1964, which he insists is a constant figure that can be applied in other Borden regions. (Tr. 7743). Yet he admits that the salaries and expenses for the Wisconsin Region, as taken from CX 4-D (which is p. 179 of RAPX 142), would not be the same in the Chicago Metropolitan Region in 1965. (Tr. 7744). Obviously then, the dollar expenditure for these items in Wisconsin in 1964 cannot be a constant figure which is applicable to other regions at other times.

He then applies the wholesale points sold in two other regions, in the month of June 1965, to the Wisconsin 1964 costs, to arrive at a cost of $.00028 per point, representing the general sales overhead applicable to private label in the Chicago Metropolitan Region. (RAPX 232, p. 93). 43/ This compares to a $.0019 cost per point for these same private label expenditures which was calculated in Wisconsin. It is clear that if there is a constant in the Wisconsin study which might be applicable to the Chicago Metropolitan Region, almost one year later, it is the conclusion that was reached in the Wisconsin study; that is, the cost per point applicable to private label. That figure was about seven times larger than the one computed by Mr. Havemeyer; $.0019 as compared to $.00028. (Compare RAPX 232, p. 93 with CX 4-D, the latter is also found in Mr. Havemeyer's underlying documentation at RAPX 142, p. 179). It is clear that there is simply no foundation for Mr. Havemeyer's results.

43/ The witness has never established a basis for including the sales volume of the Eastern Iowa-central Illinois Region, which Region was not involved in the private label sales to A&P. (Daube, Tr. 6712; Gose, Tr. 1037; Schmidt, Tr. 1665; CX 62). However, in his latest calculations on p. 93, RAPX 232, he has added an alternate calculation which eliminates these sales and still arrives at a percentage below the 10% which he has used (but substantially higher than his basic calculation of 8%).

(vii) Mr. Havemeyer Has Erroneously Deducted 95% of "Other" Delivery Costs: Mr. Havemeyer has, without record foundation, postulated that the "other delivery costs" referred to in CX 54B represent petty cash payments and product waste. (RAPX 232, p. 90). Yet these two items are carried by Borden, in its accounting records, as part of the regular delivery costs. (RAPX 232, p. 79; RAPX 71, Account 723-23). There is absolutely no evidence that there is any connection between these two costs and the "other delivery costs" referred to by Mr. Malone among the burden and overhead expenses on CX 54B. (Tr. 7750-7753). It may have been reasonable for Mr. Havemeyer to select these two items out of the "delivery expense" for special allocation, but it certainly is erroneous to jump to the conclusion, without foundation, that they are represented by this figure in CX 54B. Moreover, since there is no information as to what is represented by "other delivery costs" in CX 54B, there is no basis for excluding any of it as being inapplicable to A&P private label.

(viii) Mr. Havemeyer Has Erroneously Inflated The Petty Cash Expenditures: Moreover, even if petty cash were included in the figure in CX 54B, Mr. Havemeyer's assumptions vastly overstate the amount of "petty cash" expenditures.

Mr. Havemeyer assumes that the entire amount of subaccount 50 of Account 723-23, entitled "Other Expenses," represents petty cash and is inapplicable to A&P. (Tr. 7752-7753, 7611-7612; also see RAPX 232, p. 79). The record simply does not accord with this position, as was previously noted in Finding 9 (f) (iii) above. Only three entries in this subaccount, $559.07 out of a total of $2,024.81, represent petty cash payments. (Tr. 7611-7612; RAPX 71, Account 723-23). Mr. Daube, a Borden executive, said that this subaccount "would relate to other costs not detailed in the other details relating to delivery expenses for store wholesale accounts." (Daube, Tr. 9182). Although the exact nature of most of these expenses in subaccount 50 is not identified, it can be seen that they extend over an area covering cleaning services to soda straws. (RAPX 71, Account 723-23-50). Therefore, Mr. Havemeyer's total disregard of this expense item is unjustified.

(ix) Mr. Havemeyer's Consideration of Product Waste Is Inadequate: Similarly, if product waste *were* a part of the "other delivery costs" found on CX 54B 44/, Mr. Havemeyer's analysis of this expense and his assumptions in connection

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44/ As noted above, Mr. Havemeyer admittedly made no analysis to show that it was a part of this figure, and further, admitted that he could recall no evidence or detail which supported his assumption in this regard. (Tr. 7750-7751).

therewith, are totally unreliable. He admits that leakers and product spoiling within date would be "product waste." (Tr. 7749). However, he claims that this would be a very small part of the product waste (Tr. 7749) and that he had taken this minimal amount into account by allocating 5% of the "other delivery costs" to A&P private label. (Tr. 7753). 45/ At the same time, he admits that he has not made an analysis of Borden's product waste experience for 1965 or any other year, to substantiate his assumption that leakers and product spoiling within date would be a small portion of the route returns. (Tr. 7749-7750).

Moreover, the only evidence of record on this point contradicts Mr. Havemeyer. Competing retail grocers generally testified that they had very few returns. (Minard, Tr. 3258; Kristoff, Tr. 2431; Barney, Tr. 3838; Cox, Tr. 4002-4003). The question of leakers and product spoiling within date had not been raised when these competitors appeared, but Mr. Minard of the Tittle stores volunteered that what returns

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45/ It is important to note that Mr. Havemeyer concedes in connection with this study that leakers and product spoiling within date are "product waste" and even allocates a very small amount of product waste expense to A&P private label on this basis. As will be seen below, in his next two studies Mr. Havemeyer claims that leakers and product spoiling within date are not "product waste" and are accounted for in some other manner in Borden's bookkeeping system. In connection with the latter contention, it will also be seen below that he cannot cite to any Borden record or person from which this information was supposedly gleaned. His statement in this regard is, therefore, completely unsupported and contradicts this earlier position.

his company did have were usually leakers or product spoiling within date. (Minard, Tr. 2258). Furthermore, Mr. Havemeyer himself indicated that Borden probably experienced a high number of gallon leakers in this period, due to the fact that during this period the paper gallon packaging equipment frequently had problems. (Tr. 8101). Under these circumstances, Mr. Havemeyer's unsubstantiated assumption that leakers and product spoiling within date represented a very small part of the product waste experienced by Borden is totally unreliable.

(x) Attachment VII Is Unsubstantiated And Unreliable: In view of the circumstances outlined in paragraphs (i) through (ix) above, Mr. Havemeyer's calculations in Attachment VII of RAPX 232 must be considered to be unsubstantiated and unreliable. They are without any probative value.

(h) Attachment VIII - Summary of Margins and Profit - Much Excluded, Including Results - Remainder Defective:

Attachment VIII summarizes the calculations in Attachment I through VII of RAPX 232. The final results on pages 95 and 96 of RAPX 232 have been excluded from evidence, because of the exclusion of certain unsubstantiated time data in connection with the delivery cost calculations. (See p. 97 of RAPX 232). Additionally, however, the remainder of the data on summary pages 96 and 97 of RAPX 232 has no probative value in view of the facts outlined in Findings 9 (a) through (g) above, with sub-parts.

(i) The Borden Price to A&P For Skim Quart Is Incorrect: Additionally, it should be noted that the price which Mr. Havemeyer has considered for the skim quart in zone 1 under A&P's private label is erroneous. He has used the price of $.1440 for this item, adjusted for a $.03 per cwt. raw milk cost increase to $.1447. (RAPX 142, p. 183; RAPX 232, p. 96). In fact he has selected a typographic error from one page of CX 62. (CX 62C). A later page of this same exhibit correctly offers the price of $.1400, which with the raw milk cost increase would be raised to $.1407. (CX 62H). The fact that CX 62H is the correct price is later borne out in CX 75F, which is the Borden adjustment to its final offer to reflect such increase in raw milk costs. (Tarr, Tr. 888). Further, A&P's exhibit RAPX 66, which is Borden's "Procedure Outline" for sales of private label items to A&P, shows the "Base Price" for this item under the private label offer as being $.1400. (RAPX 66, the 16th page). Finally, RAPX 32, the Borden summary billing for Chicago and Suburbs for the week ending February 5, 1966, shows that the prices on CX 62H and CX 75F were the correct prices, since it shows the actual billing price after the inception of deliveries to be $.1407 (which is the original $.1400 plus the .0007 adjustment for raw milk cost increase as shown on CX 75F). There can be no doubt that Mr. Havemeyer has used the wrong price for this product in his comparisons.

(j) Mr. Havemeyer Did Not Study Areas Of Special Expense Incurred For A&P Alone: 46/ The record shows that certain expenses were incurred by Borden in connection with its dealings with A&P which were not incurred for other customers. Mr. Havemeyer should have studied these cost areas (Lemberg, Tr. 9421-9422), but he did not. Accordingly, his study is also defective in this regard.

(i) Mr. Havemeyer Ignored the Expense of Mr. Tarr's Services: Gordon Tarr was the manager of chain store sales for Borden. Both before and after the inception of the A&P private label contract, the great majority of his time and expense was spent in serving the A&P account. (Tarr, Tr. 845-846, 897-899). There was at least one other sales representative who was similarly engaged with the A&P account, after the beginning of private label sales. (Tarr, Tr. 898-899). Yet, Mr. Havemeyer admittedly did not make any study of this expenditure for A&P. (Tr. 7757, 9699-9709). Without making such a study Mr. Havemeyer cannot pretend to have studied Borden's cost of serving A&P. (Tr. 9699-9709; Lemberg, Tr. 9422).

46/ The letter i has been skipped in the numbering sequence in order to avoid confusion with small Roman Numeral (i), which is used frequently herein.

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(ii) Witness Ignored The Expense of Time Malone, Gose, Minkler and Others Spent On A&P Account: The very nature of the A&P negotiations and the inter-company dealings over the terms of the contract, before and after its inception, when considered along with the overwhelming importance of the A&P business to Borden (over 55% of its wholesale sales), makes it clear that a disproportionate amount of the time of various Borden executives was spent on this part of the business. (RAPX 232, p. 91, Item 1; Minkler, Tr. 125-279; Tarr, Tr. 849-889; Gose, Tr. 1045-1063; Malone, DTr. 29-204). The record is replete with evidence that Messrs. Minkler, Malone, Gose and others in Borden's Chicago office spent a very great amount of their time in getting and keeping this private label business. (Minkler, Tr. 125-279; Tarr, Tr. 849-889; Gose, Tr. 1045-1063; Malone, DTR. 29-204; CX 5-9, with subparts; CX 12-14, with subparts; CX 16-28, with subparts, CX 35-37, with subparts; CX 42-44, with subparts; CX 52-58, with subparts; CX 60-64; with sub parts; CX 72A-B; CX 75A-O, T-Z-5; CX 79-81, with subparts; CX 84-90, with subparts; CX 102A-C; CX 105-106, with subparts; CX 108; CX 110A-D; CX 303A-H). Further, there is evidence that Borden's home office personnel in New York spent a considerable amount of time on this one account; A&P in Chicago. (Archer, Tr. 1209-1212, 1228, 1230; CX 5, 7, 9, 12, 16, 22, 44, 53, 55, 64, 66, 75, 80, 90, 91, 108, and 292, with subparts). Again Mr. Havemeyer admits that he has made no special study of these expenses. (Tr. 7757-7758, 9699-9709). Without such a study, in view of the clear evidence of record that such extra expense existed, Mr. Havemeyer's study is incomplete and unreliable. (Tr. 9699-9709; Lemberg, Tr. 9422).

(iii) The Possibility of Extra Expenses in Production and Handling of A&P Label Has Not Been Studied: Early in the negotiations Borden was quite concerned with the possibility of cost problems with private label, if the A&P private label program expanded beyond the six items then under consideration. It was pointed out that these 6 items represented about 70% of A&P's total volume. It was noted that further expansion of the product line might cause cost problems in "plant efficiencies" and in "distribution material handling." In connection with handling, it was feared that expansion of the number of items would seriously hamper the palletization process. (CX 7A-B; See also CX 14E).

The private label product line was expanded to 11 products before the beginning of the contract (CX 62C) and even further, to at least 16 products, at a later date. (CX 197-Z-2). No study was ever made by Mr. Havemeyer to determine whether there were any additional costs incurred for the private label at the processing or handling levels. (Tr. 7515-7517, 7525-7526).

Mr. Havemeyer insisted that he did not know of anything which would cause such extra costs (Tr. 7525-7526, 9]18-9720) and, in the case of distribution handling, he thought that if there were extra costs, they would be miniscule. (Tr. 7517). However, the problem was real enough, and substantial enough, to worry the real experts; the management familiar with the day to day operations of Borden. (CX 7A-B). Mr. Havemeyer's own unfamiliarity with the actual operations of Borden is well established in the various findings above. The failure to consider these very probable additional costs is a serious deficiency in Mr. Havemeyer's study. (Lemberg, Tr. 9420, 9422).

(k) Mr. Havemeyer's Checking Procedures Were Deficient: In making basic underlying calculations Mr. Havemeyer did not employ a thorough, dependable checking procedure to insure the accuracy of his work. Hand calculators were frequently used, with nothing being written down for checking purposes and only spot checks as to accuracy. The witness didn't know how many, if any, checks were made on any particular calculation. Spot checks were sometimes made, but he admits that a person may have checked over his own calculations at times.

(Tr. 7840-7843). 47/ The results of such sloppy workmanship are manifest on the record of this case. A great number of corrections had to be made on the record. Other changes resulted in the complete renovation of the three series of studies into the final exhibits - RAPX 232-234. However, these corrections were only the obvious errors that could be caught through voir dire examination. In a number of instances, where basic underlying calculations have been made on hand calculators from a large volume of supporting documents, it has been impossible to check for accuracy since there is nothing in writing to check. (See, for example, Tr. 7840-7843, 7833-7836). In view of the defective checking procedures utilized by the witness, it must be presumed that a similar number of errors were made here as were made in the part of the "iceberg" we could see. The failure to follow appropriate checking procedures is, therefore, another substantial defect in Mr. Havemeyer's analysis.

47/ Such loose checking procedures should be compared with the painstaking procedure set up and followed by Commission's accounting expert, Mr. Bitting, who noted that he used extreme caution in taking data from underlying documents and "had another accountant assist [him] throughout the preparation of ... exhibits. Our practice was to check and verify each other's work before we turned it over to the typist for preparation of the final chart." (Bitting, Tr. 601).

(1) Mr. Havemeyer Frequently Unable To Substantiate His Opinions: Quite frequently, when Mr. Havemeyer was called upon to produce substantiation for his opinions he was unable to do so. While an expert does not have to present, on direct, the substantiation for his opinions or data, he is bound by the rules of evidence to produce such substantiation on cross examination when called upon to do so. (See Rule 705 of the Proposed Rules of Evidence of the United State District Courts and Magistrates). It is obvious that Mr. Havemeyer has failed in this requirement.

Mr. Havemeyer gave many responses such as "My staff made some type of check." (Tr. 7520), "I am not certain of the answer to that ... because at times we did look for other information." (Tr. 7598), "I can't recall the detail on that now." (Tr. 7751), "My staff probably has [made an analysis]" (Tr. 7751), "I can't recall." (Tr. 7755), "I am not sure of the answer to that." (Tr. 7812, "I am not certain at this time." (Tr. 6813), "I don't know now. My staff may remember." (Tr. 7824), "I don't have the answer to the question on that. An analysis must have been made ---" (Tr. 7830), "No [He didn't know.] I would have to check with my staff." (Tr. 7840), "I can only guess at this time. I still think that was the proper method." (Tr. 7849A), "I can't answer your question because I did not participate in all the details. ... At this moment I don't [know of any study]." (Tr. 8268), see also Tr. 8269), "... I cannot recall if what we read or saw is in the record or not, so when you insist on my answering, do I know, in my mind I say I know we saw it [something which allegedly showed leakers were not product waste], but I don't know if it is in the record." (Tr. 8491).

When answers such as these are given on basic matters such as the completeness and typicalness of underlying expense data and the basis for not allocating certain costs to A&P, the study cannot be deemed to have any probative value. 48/

10. A&P Failed To Meet Burden of Proof: In view of the facts set out in Finding 9(a) through (k), above, it is evident that A&P has not met its burden of proof in connection with this "profitability" study. It has attempted to show that the contemporaneous cost calculations of the Borden cost expert (designed to guide Borden's management in the negotiations with A&P) were inaccurate. Having assumed this task,

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48/ Moreover, a vague, unwritten, general instruction to his staff "to be alert for transfers into or out of accounts to be alert for ... functional expenses which seem to be unaccounted for, in general to see that the amounts in an account seem to represent the function as indicated by the account number" (Tr. 7520, 7598), simply is insufficient to meet his burden. In fact, these instructions are further shown to be deficient when compared to the burden Mr. Havemeyer himself set for dairies under the Wisconsin dairy laws, where he required that in reporting costs, "a period of sufficient length should be selected to cover cyclical and seasonal fluctuations but yet represent current methods. The month in which the price action occurred that triggered the complaint or investigation must be included." (Tr. 9135-9136).

A&P had the burden of coming forward with substantial evidence to support its position. The facts set out above show it has failed in this burden.

C. The O'Hare Study

11. RAPX 233: 49/

This exhibit purports to be an analysis and comparison of Borden's cost of serving A&P stores, as compared to 28 selected competitors (those appearing on CX 183C-D), on Borden's O'Hare routes in the month of March 1966. The alleged cost difference is then compared with a computed "net difference in price" to determine a "net discrimination in favor of A&P." (RAPX 233, Preface and p. 2). The cost elements considered in this comparison are as follows: 1. Truck Loading; 2. Physical Delivery; 3. Branch Clerical Cost; 4. Product Waste; 5. Branch Selling Expense; 6. Borden Label Advertising Expense; 7. Borden Label Merchandising Expense; and 8. General Selling and Administrative Expense.

12. Purports to Show That The Illinois Price Discriminations in Favor of A&P Were More Than Cost Justified:

This exhibit, as well as the underlying exhibits which it "corrects," purports to show that the lower price granted

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49/ This is the final "corrected" summary copy of this set of calculations. The original exhibits to which the witness' testimony refers are: RAPX 155-179, RAPX 181, RAPX 201, RAPX 203 and RAPX 228. The findings and arguments herein will apply to RAPX 233 and these latter exhibits, as a group. unless it is otherwise specifically noted that one or more of these exhibits is not affected by a particular statement.

to A&P, as compared to the prices charged to competing retail grocers, were more than cost justified as a result of alleged differences in the cost of serving such accounts. 50/

13. Mr. Havemeyer's Calculations Intended To Rebut Borden's Contemporaneous Internal Accounting:

Borden's internal accounting papers, prepared after the inception of private label sales under the Borden-A&P contract, show that Borden was selling private label dairy products to A&P at prices which were below its costs (CX 87 A-B), and that otherwise its business was profitable. (CX 206 A-D). The purpose of this exhibit is to rebut that evidence. (RAPX 233).

14. RAPX 233 Computes Costs and Prices For A&P In Two Ways:

Mr. Havemeyer computes the cost and pricing data for A&P in two ways. First, he computes such data on the basis of private label purchases only. Secondly, he computes it on the basis of A&P's purchases of all milk and dairy

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50/ It is important to note at this point that A&P has misconstrued CX 183, which does not purport to set out a comparison of prices between A&P and competing purchasers, but rather it merely compares discounts being granted to A&P, as compared to those granted to certain competing purchasers on the O'Hare Routes in February and March 1966. Our main evidence of discrimination, where we have made a detailed comparison of products and prices, concerns itself with certain Indiana customers. CX 183, as well as certain list price and published discount evidence in the record, is more general evidence of the existence of a price discrimination in sales to A&P in other areas and at other times.

products from Borden, both private label and Borden label items. (RAPX 233, pp. 1 and 2). In the case of competing customers, the data always represents the total purchases of all milk and dairy products from Borden. (RAPX 233, pp. 1 and 2).

15. Mr. Havemeyer's Calculations:

(a) Attachment 2 - Truck Loading Expense:

The witness took the "truck loading expense" from a Borden accounting record for March 1966 (RAPX 72, Account 723-037). He then allocated a portion of the amount selected, to the wholesale business of Borden at the O'Hare Branch. This was allocated on a per case basis. He then calculated the number of points per case delivered to each of the customers involved in his study. He divided the points per case into the truck loading cost per case to arrive at a truck loading cost per point for each customer. (Tr. 8208-8209). The witness admitted that cost differences resulting from this methodology, as between different customers, were due to the items of merchandise purchased by a particular customer and the quantity of each unit of merchandise taken; that is, they were due to differences in the product mix of such purchases. (Tr. 8210).

(i) Allocation Improper - Loading Expense Not Allocated In the Manner Incurred. The methodology used by Mr. Havemeyer in this allocation has created a cost difference where none can exist. This is due to the fact that he has not allocated this expense in the manner in which it was incurred. In order to reach the witness' conclusion, it is necessary to consider the merchandise as it was delivered into the store. [See Paragraph (a), above.] However, it was not loaded that way. It was loaded on pallets containing 30 or 36 cases of the various products to be delivered. (Pergler, Tr. 5695-5696).

Mr. Lemberg stated that the methodology of Mr. Havemeyer in allocating loading expense was improper, because this expense was "incurred equally per unit of product, per unit of gallons, per unit of half-gallons, per unit of quarts . . . Because they are all loaded the same way, which is just haul it out of the cooler and put it on the truck." (Lemberg, Tr. 9413). He noted that the record did not show any separation of orders prior to loading. (Tr. 9413). Thus, it cost the same amount to load a case of quarts of milk or a case of half-pints of cream no matter where the ultimate destinations of each unit in those cases may have been.

Ignoring for the moment any additional cost that may have been incurred for A&P in mixing product on the pallet prior to delivery, it costs the same amount to load any size unit of any one of the various dairy products involved herein, whether it is to be delivered to A&P or one of its competitors. (Lemberg, Tr. 9413). Mr. Havemeyer's cost difference is derived from the "product mix" ultimately taken by each customer on the route. (Tr. 8210). This simply is not the manner in which the product was loaded; nor the manner in which this expense is incurred. If properly allocated, no cost difference would arise. (Lemberg, Tr. 9413). 51/

(ii) The Allocation of Loading Expense Conflicts With Section 2(a) of the Robinson-Patman Act: The Robinson-Patman Act provides for cost differentials ". . . resulting from the differeing methods or quantities in which such commodities [commodities of like grade and quality] are to such purchasers sold and delivered." The quantity or method of delivery bears absolutely no relationship to the method of allocation used by Mr. Havemeyer for loading expense. One store could purchase a thousand gallon cartons of milk, as compared to only ten gallon cartons purchased by another, and the per unit loading cost would be identical. The first store could also purchase ten half-pints of whipping cream, as compared to one thousand half-pints of whipping cream

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51/ This methodology also results in competitors being charged twice for separating out their orders. Such separation is here being taken into account in the loading process and Mr. Havemeyer later would account for the driver's time in separating out the order at the store for independent stores (but not for A&P stores). (Tr. 7975-7981).

purchased by the second store. Again, the per unit loading cost of half-pints of whipping cream as between these two customers would be identical; but there would be a difference in loading cost as between such half-pints and the gallons cartons of milk. (Lemberg, Tr. 9413, lines 13-14; 9483-9485). 52/

Mr. Havemeyer's method of allocation does not take into account the methods or quantities of delivery of products of like grade and quality, but rather, considers the product mix which is ultimately purchased by each store. (Tr. 8210; Lemberg, Tr. 9485-9487). This is not in accordance with the cost justification provisions of Section 2(a). That Section is concerned with discriminations in price "of commodities of like grade and quality" and, as noted above, allows only those cost differentials which result from "differing methods or quantities in which such commodities are . . . sold and delivered." (Emphasis added). There is no provision for differences in the product mix in which a customer purchases. This is strictly an accidental difference which depends in this case solely on the proportion of a store's purchase of certain by-products with high "point value" per case, and not

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52/ This latter differential is due to the difference in point value as between these two products and the difference in the number of points per loaded case. A case of half-pints of whipping cream contains 66 units, with a point value of 1 each; whereas a case of gallon cartons of milk contains 6 units, with a point value of 4 each. (RAPX 78 and 66, p. 7).

upon the quantities or methods of delivery. The accidental nature and lack of connection to volume of this differentiation is revealed by the results. RAPX 233, pp. 46, 47, 48, 51, 55, 56, 58, 59 and 65 show instances where the unfavored competitor's loading cost is calculated as being lower than A&P's and the other competitors'. (In most instances it is only lower than the "total purchases" calculation for A&P, but in some cases it is lower than the "private label only" calculation as well.) These competitors are not nearly the largest customers represented in CX 183C and D, which lists all of the unfavored competitors covered in this cost study. (Compare cited pages of RAPX 232 with CX 183C and D). Thus, the loading cost as calculated by Mr. Havemeyer is not an indicia of total quantity purchased, but only of the product mix purchased. This is not cognizable under Section 2(a) of the amended Clayton Act.

(iii) Mr. Havemeyer Has Improperly Considered Other Products In His Calculation: The private label contract between Borden and A&P was limited to eleven items. (CX 62). 53/ The complaint in this matter alleges inducement or receipt of discriminatory prices only on the private label items. Mr. Havemeyer has included total purchases by the unfavored competitors in his cost calculations. For A&P, on the other hand, he has determined this and other costs on two bases: on private label items only and on all products. (RAPX 233, pp. 1-2).

53/ The number of items taken under private label was later increased, as can be seen in RAPX 234, the Hammond study.

If loading costs were determined in the proper way, as discussed in paragraphs (i) and (ii), above, the inclusion of the total product line for competitors in the calculation of loading cost would have no effect. However, under Mr. Havemeyer's methodology this inclusion of other products compounds his error and, in many instances, increases the cost differential. This can be seen by comparing the loading cost results in RAPX 233 (the O'Hare study) with those in RAPX 234 (the Hammond study). In the Hammond study, Mr. Havemeyer did consider only the private label items in calculating loading costs for A&P stores and competing stores in Northwestern Indiana. The results were quite different. In the Indiana study, the loading costs were virtually identical as between all of the stores, despite the fact that Mr. Havemeyer, in all other respects, used the same methodology in calculating this cost in both studies. (RAPX 185, p. 125; Tr. 8610-8618, 8623-8624). 54/

Since this matter involves price discrimination charges on only the private label items, those are the only items which belong in these calculations. (It is clear from Mr. Havemeyer's computations for A&P that it is not impossible

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54/ This is also a good example of Mr. Havemeyer's inconsistent methods. Here he calculates the cost on the total product line for competing customers and on the basis of private label only for A&P. (He does calculate a cost for A&P on total purchases as well.) In the next study, in the Hammond area, he considers only the private label items for both A&P and its competitors. Another good example of such inconsistency is his approach to product waste, as will be seen below.

to break these items out in his calculations). The allocation of loading expense is, therefore, erroneous in this regard as well. Again the correction of this error would virtually eliminate any cost differential as between competing purchasers, based upon loading cost.

(iv) The Determination of the Expense Involved In Loading Cost Is Unreliable: As in the case of the "profitability" study discussed above, (RAPX 232), Mr. Havemeyer's analysis of Borden's expense records in connection with this O'Hare study is deficient and defective. He has again examined only one month's record, of just one account, to determine the extent of the costs involved. (RAPX 233, p. 10; RAPX 72, Account 723-037). There has been no study made to determine that the expenses included in his calculations are either typical or complete. (Tr. 8267-8269). This must be considered a serious deficiency in light of the fact that the loading cost for March 1966 is almost half again as much as that in May 1965 ($26,756.29, as compared to $18,731.48), despite the fact that the March 1966 record does not even include one expense item, depreciation, which did appear in the May 1965 record. (RAPX 71, Account 723-37; RAPX 72, Account 723-037). Certainly Mr. Havemeyer should be under no less burden than the Wisconsin dairies, which were required, in a manual prepared by him, to produce evidence that expenses were typical and representative. (See finding 9(b)(xi), above).

(v) No Building Expense Allocated to Loading Expense: Repeating another error committed in the "profitability study" (RAPX 232), Mr. Havemeyer has failed to allocate any building expense to the loading function. (RAPX 233, pp. 10 and 15). It might appear at first glance that such omission favored A&P's competitors in this study, because it reduces the total expense and, in most instances, Mr. Havemeyer's methodology results in a cost advantage to A&P as compared to its competitors in this allocation. However, the witness has allocated all building expense to "physical delivery expense" (RAPX 72, Account 723-008; RAPX 232, p. 15), which he would allege shows a much greater disparity in costs as between A&P and its competitors than does loading expense. (RAPX 232, pp. 14-18). Therefore, he has padded the allocation under which his methodology yields the greatest cost disparity. (Lemberg, Tr. 9410-9411).

Mr. Lemberg has pointed out that the building expense more properly should be allocated to the various activities for which the building is used, including the loading function (Lemberg, Tr. 9409-9410). If this had been done, and if the loading expense had been properly allocated [See Paragraphs (i) to (iii), above] then this portion of the building expense would have been allocated evenly to each point delivered and could not result in any cost justification. (Lemberg, Tr. 9413). 55/

55/ This point holds equally true for other possible expenses associated with loading, such as refrigeration, loading machinery, repairs and others. (See Tr. 8618-8619). These should have been included here, rather than in delivery, also.

(vi) Too Much of Expense Allocated to Wholesale Sales - Loading Cost for Retail Routes Underestimated: There was only one loading expense account for the O'Hare Branch (RAPX 72, Account 723-037). 56/ These expenses therefore must be applied to all trucks loaded at O'Hare (Tr. 8260-8261). Mr. Havemeyer originally allocated this expense only as between wholesale, bulk wholesale and vendor sales (RAPX 170, p. 20; Tr. 8243-8244). As the result of voir dire examination by complaint counsel, Mr. Havemeyer discovered that he had omitted retail sales from his computations (Tr. 8260-8261). He therefore amended his calculations to include such sales in his apportionment of the loading expense. (RAPX 228; RAPX 233, p. 10).

However, in including retail sales he has apportioned the expense of truck loading equally per point among all four types of distribution -- wholesale, bulk wholesale, vendor and retail (RAPX 233, p. 10). In the case of retail sales, this is an obvious error. In March 1966 the O'Hare Branch had 33 retail routes delivering approximately 500,000 points per month (RAPX 77, p. 1; RAPX 233, p. 10). This compares to a combined 33 routes for wholesale and bulk wholesale, delivering about

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56/ The O'Hare Branch served four types of business: wholesale, bulk wholesale (primarily restaurants and institutions taking large bulk containers of products), vendor (independent distributors), and retail (home delivery). In the case of some types of expenses, such as delivery and automotive, there were separate location numbers for each of these types of business: 723-O'Hare Wholesale; 724-O'Hare Vendor; 725-O'Hare Bulk Wholesale, 774-O'Hare Retail (RAPX 68). However, in the case of some expenses such as loading expense, the total expense for all such routes were lumped in one account (Tr. 8260).

3,100,000 points per month (RAPX 76, p. 1; RAPX 233, p. 10). Obviously, the loading cost per point is not going to be the same as between retail trucks and the two types of wholesale trucks.

Mr. Havemeyer even admitted that hypothetically there would be a difference in loading expense for each of these trucks, due to the fact that a much smaller volume is being loaded onto the same number of trucks (Tr. 8273). 57/ There also must have been an increase in handling product in the loading process, since with such small volume there is going to be a correspondingly higher number of mixed pallets. Yet, the witness had never studied these situations (Tr. 8274). In fact he has never even seen the loading facilities at the O'Hare Branch; neither in 1966, nor up to the present date (Tr. 8274). Clearly, his "guesstimated" apportionment of loading expense among the different trucks is deficient and understates the expense of this function for retail business; thus overstating this expense for regular wholesale.

(vii) The Loading Expense For Vendor Sales May Also Be Unde[illegible]ted: In this same connection, Mr. Havemeyer's allocati[illegible] of loading expense to vendor sales (sales to

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57/ Mr. Havemeyer here maintains that there is no reason to believe that it costs more to load one kind of a truck than another. But in his Hammond study he argues that it cost over three times as much to load a vendor's truck than a regular wholesale truck (Tr. 8652-8653).

independent distributors) may also be understated. This too would result in an overestimation of the expense being allocated to wholesale sales (See RAPX 233, p. 10), Mr. Havemeyer estimated the amount of vendor sales in March 1966 (Tr. 8244-8248). He had the amount of such sales for May 1965 and he also had the amount of vendor sales for the entire Chicago Metropolitan Region for both May 1965 and March 1966 (RAPX 233, p. 11). He determined that vendor sales for the entire Region in March 1966 represented 142.59% of such sales for the Region in May 1965. He then factored up the May 1965 O'Hare vendor sales by this percentage to estimate the March 1966 vendor sales at O'Hare to be 1,073,939 points. (RAPX 233, p. 11).

Mr. Havemeyer admits that the correctness of this calculation depends upon his assumption that the vendor sales in the O'Hare Branch for the periods May 1965 and March 1966, bore the same relationship as did the vendor sales in the Region as between these two time periods (Tr. 8247, 8255-8256). He further admits that this correlation does not carry over into other categories of sales, such as counter sales (Tr. 8256).

In fact, it also does not apply to the bulk wholesale and regular wholesale sales. Referring to RAPX 75, the document from which the witness obtained the Chicago Metropolitan Region vendor sales figures, the bulk wholesale and wholesale sales figures are given in a combined figure identified as wholesale. (RAPX 75, pp. 1 and 2, line 68). If we compare those figures for March 1966 and May 1965, we find that the March 1966 wholesale sales for the Region were only 67% of such Region sales in May 1965. 58/ However, the O'Hare figures for combined wholesale and bulk wholesale, for these two time periods, show that the March 1966 sales were 108% of similar sales in May 1965 (RAPX 233, p. 11 - the figures for wholesale and bulk wholesale must be combined and the percentage recalculated).

This shows that Mr. Havemeyer's position is a non sequitur. (See also Tr. 8247-8251, 8255-8257). There is no correlation between Region statistics and those of the O'Hare Branch. In fact, it would appear from this that the O'Hare sales were growing at a much greater rate than sales in outlying markets. The witness even admitted that O'Hare Branch vendor sales may have accounted for most of the increase in vendor sales in the Region, as between the fifth period of 1965 and March of 1966 (Tr. 8266).

Clearly, not enough study was given to the question of where the vendor sales increases occurred. 59/ If a greater percentage occurred at O'Hare, the loading cost is understated for vendor sales and, accordingly, overstated in the wholesale sales with which we are concerned here.

58/ In referring to page 2 of RAPX 75 it is important to note that the period covered by this record is March 1967. In order to get the March 1966 figures one must refer to the data under the heading "Last Year."

59/ In this regard, it is notable that not a single Borden witness was questioned concerning this and other important questions which have been left pending due to Mr. Havemeyer's deficient analyses.

(viii) Mr. Havemeyer Has Not Studied Possible Extra Expense In Loading A&P Products: In Finding 9(e)(vi), above, it was pointed out that Mr. Havemeyer, in his "profitability" study, failed to take into account extra handling that was required for A&P product in the process of loading. This same failure occurs in connection with the present study. Mr. Pergler, of Borden's O'Hare Branch, testified that it was often necessary to mix pallets of A&P label and Borden label together, prior to loading, to make up a full pallet (Pergler, Tr. 5697-5698, 5700, 5702-5704). It was also noted that this had to be done by hand by the loaders (Pergler, Tr. 5698, 5707). 60/ Although Mr. Havemeyer claims that such mixing of pallets was done equally for everyone (Tr. 7980), there is no record substantiation for his position. Moreover, he admits that he has never observed this loading process (Tr. 8274).

Mr. Lemberg has pointed out that the failure to study costs that were incurred for A&P alone would make Mr. Havemeyer's study defective (Lemberg, Tr. 9421-9422). Without such study, Mr. Havemeyer cannot "arrive at a true cost difference." (Lemberg, Tr. 9422).

60/ Since the normal loading process consisted of a fork lift truck placing a pallet full of cases on a truck, the hand mixing of pallets before loading would obviously entail a very substantial increase in effort and expense during the loading process.

(ix) No Foundation For Witness' Calculation of Total Points Delivered On O'Hare Wholesale Routes: One of the basic figures used by Mr. Havemeyer in his calculation of both loading cost and physical delivery expense is the total number of points distributed on the regular wholesale routes of the O'Hare Branch. (See RAPX 233, p. 12 and RAPX 180). Much of the other basic data, including the volume of A&P's purchases, is derived from this figure. (See RAPX 180).

This figure is presently derived from a work-sheet which has been introduced into evidence as RAPX 180. An earlier version of this work-sheet was originally a part of Attachment 2 of RAPX 170 at p. 26. The witness had first calculated these route points at a figure roughly 35,000 points greater than that in RAPX 180. In both cases, the figure (total points delivered on O'Hare wholesale routes) was derived from a yellow sheet attached to the inside of the front cover of Borden's route books (See CX 305). (Tr. 8302-8305). During the course of his testimony, Mr. Havemeyer recalculated this figure overnight, because he "had no documentary support" for certain assumptions he had made as to the data on this Borden record (Tr. 8303-8304).

Upon further questioning it appeared that Mr. Havemeyer had no support for any assumption as to the applicability of this particular figure (Tr. 8305-8306). 61/ Mr. Daube, a Borden official was later re-called to the stand to substantiate the use of this figure as representing the sales points on the O'Hare routes. At first, he did state that the figure used by Mr. Havemeyer (on the last handwritten line of this sheet) represented the total wholesale points and packages sold on each route during the month covered by the route book (Daube, Tr. 9179). Upon cross-examination, however, the witness admitted that he was not familiar with the form of record in question (Daube, Tr. 9192, 9203) and that the figure utilized by Mr. Havemeyer was not entered in accordance with the form and intent of this record (Daube, Tr. 9194; See CX 305). Further, it was quite obvious that he did not know what the figures on the form represented (Daube, Tr. 9194-9205).

61/ Mr. Havemeyer stated that some check was made to determine that this figure conformed with the number of points delivered as shown by the entries within each route book (Tr. 8305). However, since the points delivered to A&P stores were generally not shown in the route books, it was impossible to reconcile such figures. He also admits that Mr. Pergler, the O'Hare Branch Manager, did not testify concerning the meaning of these figures. (Tr. 8305-8306).

In explanation of one of the other entries on the form, "Commission Points," Mr. Daube stated that this was the volume on which the commission to the driver is paid (Daube, Tr. 9194). He then went on to give an opinion as to what various other figures, prior to the total figure at the bottom, represented (Daube, Tr. 9194-9205). His testimony indicated that certain of the listed product categories would not be subject to commissions (Daube, Tr. 9201). Of course, the union contracts in evidence also show that commissions were not paid on approximately the first 2,000 points delivered on a route each week (CX 119J-K). It was then pointed out that this sheet in the front of some of the route books showed the Commission Points were greater on those routes than were the "total" points (Daube, Tr. 9204-9205), thus destroying his premise as to the relationship between these figures and the so-called total figure.

Thus, Mr. Daube was shown to have no knowledge as to the intent and meaning of the figures on this Borden form. (Daube, Tr. 9191-9205). Mr. Havemeyer, on Surrebuttal, tried to rehabilitate Mr. Daube's supportive testimony, by advancing a theory concerning the transfer of customers between routes as the explanation of variances between the figures for commission points and the last "total" figure on these sheets (Tr. 9]41). However, Mr. Havemeyer's own calculations reveal the lack of support for this assumption. RAPX 254 is an exhibit prepared by the witness to show the number of customers transferred out of Route W-13 and the other O'Hare wholesale routes. Routes W-13 and W-1, which both had a greater number of Commission Points than so-called total points, had 6 customers and 5 customers transferred out, respectively. However, Route W-18 also had six customers transferred out and still had a lower figure on the "Commission Points" line than on the last, or "total" line. Similarly, Routes W-11 and W-12 both had 3 transfers out and the Commission Points were substantially less than the "total" figure. (RAPX 254). Thus, there is no necessary correlation between the transfers out and the relationship between Commission Points and "total" points. Therefore, we still do not have any idea of the meaning of this last figure on the yellow-sheet attached to the route books.

Notwithstanding this deficiency, Mr. Havemeyer has relied on these "total" figures in his determination of the number of points sold on the O'Hare wholesale routes (Tr. 8302-8305). If this figure does not represent such total sales, then various other calculations on RAPX 180, including the sales volume to

A&P stores, is pure fiction. 62/ The witness most certainly has not met his burden of proving the reliability and relevancy of this data.

(x) Loading Cost Calculations Erroneous -- No Cost Justification: In view of all of the above errors, Mr. Havemeyer's calculation of loading expense must be considered defective and erroneous. In fact, it is clear that this function cannot give rise to any cost difference and that any cost justification credited to this function by Mr. Havemeyer must be eliminated entirely.

(b) Attachment 3 - Physical Delivery Expense:

In this attachment Mr. Havemeyer has attempted to allocate the physical delivery expense to A&P stores and competing purchasers. He has lumped together four categories of expense - automotive, building, labor and labor supervision - as representative of the physical delivery expense. This data was to be used along with his so-called "time standards" to arrive at a cost per route minute. This would then have been applied to the individual stores on the basis of service time, which was also to be based on his "time standards." (Tr. 8365-8370; 8423-8428; RAPX 233, pp. 15, 18, and 4).

62/ The A&P sales volume is derived by the witness by subtracting sales to independent stores, schools and other non-store customers from this total sales figure (Tr. 8316-8317). The reliability of the A&P sales volume figure is further impaired by the fact that the sales volumes to the independent stores are also calculated figures. (Tr. 8314-8315).

As in the case of RAPX 232 (the profitability study), Mr. Havemeyer has failed to produce competent evidence to support his assumptions as to time. Consequently, a great portion of this section of his study has been excluded from evidence, as have been the results. (RAPX 170, pp. 33, 42-43, 53). It is important to note that in the case of each and every one of the competitors involved in this study, the elimination of the delivery cost difference eliminates all or most of the "justification" determined by Mr. Havemeyer. (See RAPX 233, pp. 39-66).

As will be more fully noted in the following paragraphs, the failure to substantiate his time estimates is only one of many errors which Mr. Havemeyer has made in the allocation of delivery expense.

(i) Premise of Allocation-That A&P Stores Required Less Service Time: The main premise of this allocation is that A&P, due to the terms of service of its private label contract with Borden, required much less service time per unit of product than did its competitors. (RAPX 170, Attachment 3; Tr. 8215-8216). The witness did not make any study of the comparative times taken to serve A&P stores and their competitors, but instead, attempted to apply so-called "time standards" for which he was unable to produce substantiating evidence. (Tr. 8211-8212; See also "Order Supplementing and

Modifying Order of September 11, 1974 Re Mr. Havemeyer's Cost Justification Exhibits," dated September 16, 1974). 63/

(ii) Service Difference Could Not Be Considered Even If It Could Be Shown To Have Resulted In Time Difference: Only those cost differences which are due to the "differing methods or quantities" of sale or delivery are cognizable under Section 2(a) of the amended Clayton Act. Even if it is conceded, which complaint counsel do not, that there were substantial differences in the methods and time requirements of delivery as between A&P and its competitors, the cost difference in this case cannot be related to such "differing methods." In fact, Borden offered to all other stores the same type of service it contracted to supply to A&P. (Compare CX 62P and Q with CX 123A-B and 138.) 64/ However, in contrast to the great savings granted to A&P on private label, Borden offered only 2% additional discount to its other customers for such "limited service." (CX 123A-B and 138). If, in fact, "limited service" did provide substantial savings to Borden, and if, in fact, any or all of A&P's

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63/ Mr. Havemeyer was also quite arbitrary in classifying customers into full service, or limited service, as will be more fully developed below and in connection with the Hammond Study (RAPX 234).

64/ In fact, Borden was operating under a Court Order which required it to offer any service alternatives to all customers. (See Order Taking Official Notice of Court Judgment, dated November 27, 1973.)

competitors did not take "limited service" under the terms offered, it was due to the fact that "limited service" was not offered to competitors on the same basis as it was offered to A&P. (Tr. 8336, 8334). 65/ Thus, the difference, if any existed, was not due to a "differing method" of delivery, but to the different terms under which this delivery system was offered.

To credit such a "boot-strap" cost justification theory would be to tell A&P's competitors that they must accept less service at a very slight difference in price in order to preserve their rights under Section 2(a) of the amended Clayton Act. In such case, they might have been under an even greater economic handicap, if Mr. Havemeyer's theories of the relative time of service have any substance. Such result is obviously contrary to the intent and purpose of the Act.

Accordingly, any time difference which might have existed, was not due to "differing methods" of delivery, but solely to

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65/ Under Mr. Havemeyer's classifications, only some of the smaller independent stores on the O'Hare routes are credited with receiving limited service. He theorizes that small customers can be forced to accept limitations on their service, even if there is not a commensurate savings in the nature of a discount (Tr. 8336). On the other hand, in the case of larger stores, he indicates that the discount granted in connection with such service limitations must be sufficient to overcome the additional expense incurred by the store, in order to induce it to accept limited service (Tr. 8334).

the inequity of the respective offers made by Borden to A&P and the competing stores. Such difference cannot, therefore, be taken into account in a cost justification study under Section 2(a) of the amended Clayton Act. 66/

(iii) Commission Expenses Are Incorrectly Allocated On A Time Basis - Commissions Cannot Give Rise To A Cost Difference: Again, as in the case of the "profitability study" above, Mr. Havemeyer has attempted to foist on competing grocers a substantial part of Borden's cost of doing business with A&P. A very substantial part of the expenses being allocated under this category represents commissions paid to the deliverymen. (RAPX 233, p. 16). This, as well as the rest of the expenses included in the physical delivery allocation, would be allocated by Mr. Havemeyer on the basis of his estimated serving times. Yet, the record establishes very clearly that commissions are earned and paid on the basis of volume delivered, not according to the number of hours worked, or the time spent on serving the stores. (Pergler, Tr. 5731-5732; CX 119J-K).

66/ This logic applies equally as well to other elements of Mr. Havemeyer's study, where he claims A&P stores have no expense, or less, due to the limitations on service stated in the contract. These areas include product waste, selling expense and merchandising expense.

This defect in Mr. Havemeyer's methodology is discussed in great detail in Finding 9(f)(vii) above. The facts outlined there bear equal weight in connection with this study and need not be repeated here. They are therefore incorporated herein by reference. It should suffice to note that, again, almost a third of the total expenses being allocated under delivery expense are commissions and are erroneously applied so as to give the illusion of a cost difference. In truth and in fact, this substantial sum (commissions) is related solely to volume and must be related equally to each unit delivered. It cannot, therefore, result in any cost difference as between competing purchasers. (Lemberg, Tr. 9405, 9434-9436, 9408).

(iv) Building Expense Is Improperly Allocated: Mr. Havemeyer has allocated the total building expense to the wholesale delivery function and, therefore, on the basis of time spent at the store by the deliveryman. (RAPX 233, p. 15). This is improper.

First of all, there is only one building expense at the O'Hare Branch (RAPX 72, Account 723-008). Mr. Havemeyer has explained in connection with the loading expense allocation, that where this is the case, such expense must be spread to all four sales categories of the branch -- wholesale, bulk wholesale, vendor and retail (RAPX 233, p. 10;

Tr. 8260). Even ignoring the fact that a disproportionate share should be accorded to retail (see Finding 15(a)(vi) above), it is clear that no more than one-fourth of the building expense could be allocated to wholesale delivery. This reduces the amount in question to $504, at the very most. (RAPX 233, p. 15).

However, even this amount should not be allocated to the delivery expense in the manner used by Mr. Havemeyer. The building expense is in no way related to the time the deliverymen spend in the stores (Lemberg, Tr. 9412). Such expenses should be allocated in accordance with the various functions and activities for which the building is used, including loading, milk storage, clerical work, sales work, etc. Thus the greatest part, if not all, of the $504 remainder of this expense should not be allocated to delivery expense nor on a service time basis. (Lemberg, Tr. 9409-9412).

(v) The Automotive Expense Is Improperly Allocated On The Basis Of Service Time: Mr. Havemeyer has repeated an error in methodology which he began in the "profitability study" (RAPX 232). He has allocated the automotive expense of the delivery trucks on the basis of the time spent by the deliverymen in serving the individual stores (RAPX 233, p. 15;

Tr. 8365-8370). This is not the way in which such expenses are incurred. The reasons why such allocation is erroneous are fully explained in Finding 9(f)(viii), supra, in connection with RAPX 232 and will not be repeated here. They are incorporated here by reference. 67/

(vi) Mr. Havemeyer's Categorizations Of Type Of Service Are Arbitrary And Unfounded: In connection with the attempted application of his so-called "time standards," Mr. Havemeyer classified all A&P stores as "limited service" and all unfavored competitors involved in the O'Hare Study (those listed in CX 183C and D) as being "full service" (RAPX 170, p. 82). In the case of some of the unfavored competitors, he relied on the testimony of Mr. Pergler, Borden's O'Hare Branch Manager, in making his decision. In the case of some others, he relied on notations in the route books or on the stipulation between counsel (RAPX 35). (RAPX 233, p. 8; RAPX 170, p. 82; Tr. 8318-8333).

67/ Finding 9(f)(viii) concludes that automotive expense should be allocated equally to each unit of product and, therefore, could not result in any cost difference. (See Lemberg, Tr. 9408-9409, 9447, 9451.) Expenses which cannot result in a cost difference could and should be deleted from any study of cost differentials. The removal of automotive expense and commissions from the delivery expense allocation, as well as most of the building expense, result in the elimination of over half of the expenses which Mr. Havemeyer is attempting to allocate in this category (almost $29,000 out of $55,000). (RAPX 233, pp. 15 and 16).

The witness' testimony reveals that he was sometimes quite arbitrary in categorizing competing retailers as "full service." It is clear that if there was even the slightest additional service, over and above his impression of "limited service," the customer was classified as "full service." For example, in the case of one customer, Theresa Crispino, the driver merely dropped off the merchandise inside the back door (RAPX 35; Tr. 8322). Mr. Havemeyer classified this customer as "full service," because it paid daily, did not pre-order and received replacements for out-of-date merchandise (Tr. 8322, 8325), despite the fact that it was also established that out-of-date merchandise "was infrequent and involved only small quantities usually of the low-volume dairy by-products" (Tr. 8324; RAPX 35). This customer is still put in the same category as some other stores where the driver delivered product to both the cooler and display case and rotated the stock in the display case. (Tr. 8322).

Again in the case of Bruno Nalepa, we have an almost identical situation. Here the product was delivered to the front of the dairy case, but the product was not put in the case or rotated. There was replacement of out-of-date merchandise and there was no pre-ordering. (Tr. 8325). It also appears quite arbitrary to say this customer requires the same service time as someone receiving a number of additional services. Further, a reading of RAPX 35 and the testimony of Messrs. Cox and Lasorso (Cox, Tr. 3991-3943, 4002-4003; Lasorso, Tr. 2697-2699) will reveal that there was a great deal of variation in the amounts of service given to the various customers represented therein. Yet all are classified as taking the very same "full service."

On the other hand, 19 A&P stores received additional service in the form of "route bookkeeping" services, which Mr. Havemeyer considered to be over and above "limited service." Yet none of these stores were classified as "full service." (Tr. 8926; RAPX 233, p. 8; RAPX 170, p. 82). 68/

Most importantly, of course, Mr. Havemeyer never made any study of the comparative service times actually involved as between A&P and competing customers, but simply relied upon his categorization of customers and his own time estimates, as embodied in his "time standards" (Tr. 8365-8370; RAPX 170, p. 82). There is no evidence of record as to any actual time saving involved as between the "full service" and "limited service" practiced by Borden on the O'Hare routes.

68/ Contrary to this procedure in the O'Hare study where this additional work was simply ignored, in the Hammond study (RAPX 234) Mr. Havemeyer grudgingly added a slight additional expense to the A&P computation for this one item only. (RAPX 227; Tr. 8667-8668, 9068-9070).

(vii) Mr. Havemeyer Has Failed To Make A Proper Classification Of Customers: Mr. Havemeyer has made no attempt to sort out and classify the competitors of A&P by store size, type of store operation (such as supermarket, neighborhood store or "mom and pop"), purchase volume, or other standards of efficiency of operation. He merely lumps them all together under the categorization of "full service." (RAPX 170, p. 82). Thus, he has decided they are identical in service requirements if they take any element of what he considers "full service," notwithstanding the fact that the record discloses very substantial differences in the services received by the various competitors. (See Paragraph (vi) above and CX 35; also RAPX 170, p. 82.)

It is quite obvious that there is a vast difference in serving a supermarket with a regular refrigerated cooler, as compared to servicing a little store such as Edward Truty which had a home-style refrigerator (RAPX 35, p. 2). It is, therefore, clear that there are differences in the types of stores served by Borden on these routes. Moreover, the Borden volume discount schedules show that there are also differences in the volume brackets of the purchases of these various customers (CX 120, 123C and 138; See also CX 183A-D). 69/

69/ The record reveals very substantial differences in purchase volumes taken by the various stores, including the individual A&P stores. (CX 183; RAPX 74). The evidence also shows that volume plays a very important part in cost. (Abrams, Tr. 6425-6427; Dr. Solverson, Tr. 1551-1552, 1554-1555).

Thus, the evidence clearly demonstrates that there were more than one class of customer served by Borden's O'Hare routes. At the very least, there were these two bases of classification: type of store and volume bracket. Some study of the classification question may have revealed other bases, such as modernness and location of delivery site. Yet Mr. Havemeyer has ignored these critical areas of study. (RAPX 170, p. 82; RAPX 233, p. 8).

This fact is surprising in light of Mr. Havemeyer's past experiences in the *Bowman* case, where his study was rejected because of his failure to properly classify customers (Tr. 7685). It is also surprising in light of Mr. Havemeyer's work for certain state agencies, where he has given *some* recognition to the need to classify customers by type of store and volume purchased. (See RAPX 245A, Table 2; RAPX 245B, Tables 2A and B; and RAPX 245C, Tables 3A-G.) [70]

Mr. Havemeyer's failure to classify the Borden customers properly is a fatal defect in this allocation, as well as in the allocation of other expense categories, as noted below.

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[70] In connection with his work for such State agencies, it must be remembered that these studies were intended to provide general guidelines to the States involved and were not designed to be so precise a cost justification study as that between two competing customers of the same dairy. (RAPX 245A-C). It is clear that proper classification of customers is far more critical in a Robinson-Patman type cost justification study.

(viii) Mr. Havemeyer Has Improperly Considered Other Products In His Calculation: As noted above, in connection with the allocation of loading cost [Finding 15(a)(iii)], Mr. Havemeyer has computed costs for the unfavored competitors on all products purchased from Borden. For A&P he has, in one set of computations, broken out the cost of delivering only the eleven private label items. (RAPX 233, p. 2). Of course, in that instance, the cost of the various functions is substantially lower when limited to the private label items only. 71/

Such comparison is improper in that the discriminatory prices with which we are concerned relate only to the private label items and those equivalent items taken by A&P's competitors. (Complaint). It is clear that it is not impossible to break out the costs for these items only, since Mr. Havemeyer has done so for A&P (and for competing purchasers in the Hammond Study - RAPX 234). (RAPX 233, pp. 2, 39-66). Moreover, it is clear that the private label

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71/ See RAPX 233, pp. 2 and 39-66. Compare the cost of the various functions in the "private label items only" column with those in the "total private label and Borden label" column.

items have special significance, since these are the items which respondents selected to be included within the private label contract and to receive special pricing treatment. 72/

As stated above, the price discrimination charges herein involve only the private label items. (Complaint). The cost justification provision of Section 2 of the amended Clayton Act applies only to "such commodities [of like grade and quality]" (emphasis added). It is clear that the cost of serving these particular commodities must be determined. Therefore, Mr. Havemeyer's inclusion of other products is erroneous.

(ix) No Proof Of Comparative Times Of Service - Allocation Impossible: As noted above, the allocation of the expenses which Mr. Havemeyer has lumped under "physical delivery expense" were to be allocated to A&P and its competitors on the basis of "service time" (Tr. 8365-8370, 8423-8428). However, Mr. Havemeyer has been unable to produce competent evidence as to the service time involved in the case of such customers. (See "Order Supplementing and Modifying

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72/ It is important to note that A&P soon converted almost completely to private label. (CX 185; RAPX 234, p. 20).

Order of September 11, 1974 Re Mr. Havemeyer's Cost Justification Exhibits", dated September 16, 1974.) As a consequence, Mr. Havemeyer has failed to produce evidence of any cost difference, as between A&P and its competitors, in connection with the physical delivery function.

(c) Attachment 4-Branch Clerical Expense:

Mr. Havemeyer has, in this allocation, apportioned the O'Hare clerical expense (RAPX 72, Account 723-004) as between wholesale, bulk wholesale vendor and counter sales (since there is only one clerical expense account at O'Hare). He then allocates the expense to customers on the basis of the delivery ticket, or number of deliveries. In the case of A&P private label there is an even further breakdown, in that he accords only about 29% of the per delivery clerical cost to private label, based upon the number of lines on the delivery ticket used for private label. (RAPX 233, pp. 11 and 19; Tr. 8222-8224, 8466-8479). Having arrived at a cost per delivery ticket (or part of a delivery ticket for A&P private label), he then divided the cost per ticket by the number of points delivered per delivery to a particular customer to arrive at the clerical cost per point for each customer (Tr. 8480). 73/

(i) *Clerical Expense Not Related Solely To Delivery*: Mr. Havemeyer has explained the philosophy of this allocation in connection with RAPX 232 where he states that he allocated branch clerical cost "on the basis of delivery tickets since the principal function of Branch Clerical is the handling of these delivery tickets, *or one of the significant functions at least of Branch Clerical* is the handling of delivery tickets" (Tr. 7716). (Emphasis added). Implicitly he admits that there are other significant functions performed by the branch clerical staff. This is obviously the fact.

73/ In surrebuttal Mr. Havemeyer was critical of Mr. Lemberg because the latter allegedly characterized this allocation as being based on the "delivery ticket" whereas the allocation was really made on the basis of the "delivery." (Tr. 9692-9693). In fact, Mr. Lemberg stated that "He [Havemeyer] allocated these costs by determining, *calculating a cost per delivery* and then allocating these costs on the basis of the number of deliveries to each customer .... There is no showing here that all of these clerical costs were related to the delivery ticket, *which this would amount to*." (Lemberg, Tr. 9414). (Emphasis added). Thus, Mr. Lemberg clearly understood and accurately described Mr. Havemeyer's method. Indeed, Mr. Havemeyer himself refers to this allocation as being on the basis of the delivery ticket. (See RAPX 233, pp. 11 and 19; Tr. 8480, 8222-8224, 8466-lines 14-15, 8473, 8474, 8476, 8477, 8478, 8479, 7716, 8144-8145.)

Mr. Lemberg has pointed out that branch clerical costs also involve a number of other significant functions, such as, inventory control, maintenance, operation of the vehicles, payroll, and the selling function (Lemberg, Tr. 9414). A number of these items bear far more directly on volume, than on the number of lines on a delivery ticket (Lemberg, Tr. 9415). 74/ Of course, as noted frequently above, volume-related expenses do not result in any cost justification, because they apply equally to each unit no matter where it is delivered. (Lemberg, Tr. 9408).

Therefore, Mr. Havemeyer has not allocated branch clerical expense in the manner in which it was incurred. (Lemberg, Tr. 9414-9415). The allocation is, consequently, erroneous.

(ii) Mr. Havemeyer Uses Two Conflicting Methods Of Allocation: In Mr. Havemeyer's computation of this expense he has allocated branch clerical expense by two conflicting methods. In allocating the total branch clerical expense to different branch activities -- wholesale, bulk wholesale, vendor and counter sales - he has allocated it on a straight volume basis (that is, equally per point handled by the

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74/ Of course, this logic applies whether you are talking about the "delivery ticket" or "delivery," since it is the function of the clerical staff that concerns us here, not the semantical question as to which phrase best describes Mr. Havemeyer's allocation method.

Branch). But in allocating the wholesale portion to individual customers he then switches to a per ticket, or per delivery, basis. (RAPX 233, p. 11). On the one hand he is thus stating that each point handled by the Branch generates about the same amount of clerical activity. While on the other hand, his methodology rejects the per point basis for allocating clerical cost to store customers, and argues that the entire clerical cost to these customers should be based on the processing of the daily delivery ticket. (RAPX 233, p. 11; Tr. 7716).

Of course, Mr. Havemeyer has never made any study of just how the branch clerical cost at O'Hare is incurred. In fact, he has never even observed such branch clerical functions. (Tr. 7731).

(iii) Wholesale Branch Clerical Costs Overstated - He Ignored Costs Related To Retail Sales: Mr. Havemeyer admits that Account 723-004 was the only branch clerical expense account for the O'Hare Branch (Tr. 8472). He admits also that the O'Hare Branch operated 33 retail home delivery routes at that time, in addition to the 33 wholesale and bulk wholesale routes and the various vendor and counter sales. (Tr. 8473; RAPX 76, page 1). He also admits there would be a clerical expense in connection with the retail sales (Tr. 8473). Lastly, he admits that the retail sales have not been taken into account in his apportionment of the clerical expense among the various sales categories. Moreover, his only answer as to why they were not was ". . . I am trying to think of the reason for it." (Tr. 8473).

It is obvious that no allocation of O'Hare's branch clerical expense could be proper that ignored the clerical work that went into the operation of 33 retail routes. Since only 33 other routes (wholesale and bulk wholesale) were operated by Borden out of O'Hare in March 1966, it is quite certain that the retail routes accounted for at least half of the clerical expense associated with payroll. (RAPX 76, p. 1, and RAPX 77, p. 1). If processing of delivery tickets is another important function, the amount of those tickets involved on 33 retail home delivery routes, serving untold thousands of customers, was undoubtedly quite large. Truck maintenance and other related office functions would also be proportionally high when related to 33 retail routes.

There can be no question but that the amount of clerical expense related to wholesale sales is vastly overstated. This is another fatal defect in Mr. Havemeyer's allocation of this expense.

(iv) No Study Made Of Differences In Clerical Costs For Cash Customers: Mr. Havemeyer's methodology, in allocating clerical costs on the basis of the delivery (the processing of the delivery ticket) treats daily cash-basis customers in the same manner as credit customers (Tr. 8476-8478). Mr. Havemeyer admits that the same type of clerical service was not done for cash customers as was done for credit customers (Tr. 8477). Indeed, it is obvious that Borden's clerical work and records would not be as extensive for a customer whose account was paid daily upon delivery. Of course, Mr. Havemeyer has not made any study of the clerical function at O'Hare (Tr. 7731), therefore he is not in any position to determine the amount of clerical time spent on cash customers as compared to credit customers.

By Mr. Havemeyer's own calculation (RAPX 180), it is shown that 53 out of 72 independent store customers on the O'Hare routes were daily cash-paying customers. Thus, this question is far from inconsequential. (Tr. 8477).

This illustrates, even more, the error in the witness' methodology in allocating the clerical cost on a per delivery basis. It is quite clear that much of the branch clerical expense is simply not incurred in that manner. (Lemberg, Tr. 9414-9415). Mr. Havemeyer is trying to force a square peg into a round hole. His methods are obviously without foundation and erroneous. (Tr. 7731).

(v) Mr. Havemeyer May Have Underestimated Portion Of Clerical Expense For Schools: In the course of this allocation Mr. Havemeyer had to determine the number of deliveries to schools and other non-store customers (RAPX 233, p. 19). In determining the number of school deliveries in March 1966 he relied on RAPX 74, a breakdown of Borden's O'Hare routes in March 1965. In March 1965 there were four school routes serving an average of about 20 schools per route, according to RAPX 74. In March 1966 there were only 2 school routes. Mr. Havemeyer applied the same average number of stops (20) to these two routes to determine the number of deliveries to be included in his clerical cost allocation. (Tr. 8474-8476).

However, the witness' own calculation shows there was a drastic change in the O'Hare school routes in the interim period between March 1965 and March 1966. The number of routes was cut in half from four to two. (Tr. 8474-8475). There is no evidence in the record as to how many schools each of those routes were serving (Tr. 8476). Moreover, it is difficult to assume, as we must under Mr. Havemeyer's position, that Borden lost its business with fully half of the schools served in the prior year by March 1966. RAPX 74 shows that a school route was capable of serving more than 20 schools, since two of the routes in March 1965 were serving a greater number. As far as Mr. Havemeyer's study is concerned, the two Borden school routes in March 1966 might have been serving all the schools served by the four routes in March 1965. There is no way to tell. (Tr. 8476).

Since the burden is upon A&P to adduce evidence in support of Mr. Havemeyer's calculations, the worst must be assumed in this instance. It must therefore be assumed that the number of deliveries to schools has been substantially understated. Consequently, the amount of clerical expense involved in school sales has been understated and the amount of clerical expense involved in store sales has been overstated.

(vi) He Ignores Possible Extra Expense For A&P: Mr. Havemeyer admits that in the case of A&P there is a daily delivery ticket for each individual store and a summary billing sheet which combines the billings for a number of stores in one area (Tr. 8484, 8486). Necessarily then, there had to be extra processing of the A&P billings. First, the individual store daily delivery ticket had to be processed and then a number of the daily slips had to be summarized into a weekly billing slip by area. 75/ These facts were not considered in Mr. Havemeyer's allocation of clerical expense to A&P. (Tr. 8478-8480, 8484-8486, 7716-7730).

This raises the distinct possibility that extra clerical expense was involved in the case of the A&P account. Yet Mr. Havemeyer has failed to make any study of this situation. It is essential in a cost study, such as the one offered here, that a special study be made of any possible countervailing costs that may have been incurred for the favored purchaser alone. Otherwise, the study cannot arrive at a true cost difference. (Lemberg, Tr. 9421-9422).

75/ Then, of course, Borden performed an additional extra service for A&P. It included much more information than a simple accounting of units and charges as in the case of competitors. In fact, Borden even had to include the retail price and extended retail value for each product, and on a total basis, at A&P's request. (See RAPX 170, pp. 87-91; "A&P's Further Amended Answer to Complaint Counsel's Request For Admission," dated March 12, 1973, page 2, second paragraph.)

(vii) The Determination of Clerical Expense For Private Label On The Basis Of Lines On The Bill Is Erroneous: Mr. Havemeyer has determined the clerical expense for A&P private label on the basis of the fact that private label represented 11/38ths or about 29% of the number of lines on a summary billing to A&P. (RAPX 233, p. 11; Tr. 8478-8480). Aside from the fact that on a volume basis private label represented a far greater proportion of A&P's purchases (See CX 185) and thus, on the basis of findings above, should be chargeable with far more of the clerical expense, this methodology also ignores the fact that there were far more lines on an A&P billing than on billings to others. A&P was, at this time, purchasing 11 additional items, over and above Borden's regular product line. It was purchasing 11 items under both Borden and private label. (RAPX 170, pp. 87-91).

The methodology used by Mr. Havemeyer would conclude that clerical cost in connection with A&P private label was 11/38ths of the clerical cost chargeable to a competing store. However, competing stores could not even order 38 line items. (In fact they didn't even order 27--the number of Borden label line items on an A&P billing-See CX 305.)

If the "delivery ticket" methodology bore any validity, it would at the very least require that a greater expense per ticket be allocated to the larger A&P ticket in the first place. This would, of course, result in a higher clerical cost being allocated to private label and a lower clerical cost being allocated to each competitor.

(viii) Witness Has Improperly Considered Other Products in the Calculation of Competitors' Expense: As noted in connection with delivery and loading expense, above, Mr. Havemeyer has improperly compared costs of competitors on the basis of the entire product line purchased from Borden. The same logic applies here as in those cases. Therefore, the facts outlined in Findings 15(a)(iii) and 15(b)(viii) are incorporated herein by reference. This practice represents a substantial defect in the allocation of clerical expense also. 76/

(d) Attachment 5 - Product Waste:

The witness took the expense for product waste from the wholesale delivery expense account (RAPX 72, Account 723-023) and allocated it evenly to all wholesale points, excluding A&P's purchases and those of 15 independent stores which he determined were receiving "limited service." (RAPX 233, pp. 20 and 21). He excluded the purchases of the latter stores (A&P and the 15 others) on the basis that product waste did not apply to them. (Tr. 8488-8489).

76/ Note that in RAPX 234, the Hammond Study, Mr. Havemeyer does limit his calculation of clerical expense for competing stores to the private label equivalent items and in some instances in that study the competitors are credited with having a lower cost than A&P. (RAPX 234, pp. 3-10).

(i) Evidence Indicates That Product Waste Applied To All -- It Included Leakers And Product Spoiling Within Date: Leakers and product spoiling within date could be returned by all customers, including A&P. (See CX 62Q; CX 123B and CX 138). Mr. Havemeyer admits that leakers and product spoiling within date are "product waste" (Tr. 8490, 7749). However, he now states that he "believed" that such defective merchandise was charged back to the plant and not included in the product waste expense -- but he cannot refer to any evidence that this was the case. 77/ (Tr. 8490-8492). To this date no such evidence has been introduced, despite the fact that Mr. Daube, a Borden executive, was later recalled to the stand and could have been questioned on this point.

In the absence of any other evidence and in view of Mr. Havemeyer's admission that such defective products constitute "product waste", it must be considered that the product waste being allocated, included leakers and product spoiling within date.

(ii) Only Evidence of Record Indicates Defective Products to be Substantial Part of Product Waste: Competing retailers of any size generally testified that they had very few returns. (Minard, Tr. 3258; Kristoff, Tr. 2431; Barney, Tr. 3838; Cox, Tr. 4002-4003; See also RAPX 35).

77/ As noted below, this is a new position for Mr. Havemeyer. He did charge some product waste to A&P in the profitability study (RAPX 232).

The question of leakers and product spoiling within date had not been raised when these competitors appeared, but Mr. Minard of the Tittle stores volunteered that what returns his company did have were usually leakers or product spoiling within date (Minard, Tr. 3258). Moreover, Mr. Havemeyer himself indicated that Borden probably experienced a high incidence of gallon paper leakers during this period (Tr. 8101). Under the circumstances, *the only record evidence* indicates that a substantial portion of product waste was represented by leakers and product spoiling within date. *78/*

(iii) *Mr. Havemeyer Has Been Inconsistent and Contradictory In Allocating Product Waste*: In fact, Mr. Havemeyer has been inconsistent and contradictory in allocating product waste. In RAPX 232, the "profitability study," *he has allocated some product waste expense to A&P* on the basis of leakers and product spoiling within date (Tr. 7749-7753). *79/* Now he claims such products are not even "product waste" under Borden's accounting system (Tr. 8490), although he cannot cite to any evidence to support this position (Tr. 8490-8492). Under these

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78/ Possibly almost all in the case of the larger, more modern supermarkets, both independent and chain.

79/ Of course, even in RAPX 232 he has not allocated nearly enough of this expense to A&P. [See Finding 9(g)(ix), *supra*.]

circumstances, little credibility can be given to his testimony.

(iv) Mr. Havemeyer Has Not Studied Different Classes Of Stores In Connection With Product Waste: Mr. Havemeyer has allocated product waste expense equally to each competing store (other than limited service stores). This too, is erroneous. The testimony of some larger competing customers in this matter, as well as the stipulation of testimony of other customers (RAPX 35), indicates that the larger independent stores had very few returns (Minard, Tr. 3258; Kristoff, Tr. 2431; Barney, Tr. 3838; Cox, Tr. 4002-4003). Indeed, it is to be expected that small neighborhood stores purchasing very small volumes would have the worst record, insofar as product waste is concerned. Yet here, as in the case of other expense categories such as delivery, Mr. Havemeyer has made no study of the different classes of customer, by type of store and volume of purchases, to determine just how this expense arose. (RAPX 233, pp. 20 and 21; Tr. 8488-8492).

This omission constitutes another obvious error in his methodology. There is no showing in this record that any specific customer, especially among the larger volume purchasers, experienced any greater incidence of product waste than did A&P.

(v) Product Waste Allocation Clearly Erroneous: In light of the above facts [Paragraphs (i) through (iv)], Mr. Havemeyer's allocation of product waste expense must be considered erroneous. There is no showing of any cost difference based upon this expense item.

(e) Attachment 6 - Branch Selling Expense:

In this attachment the witness has taken certain expenses from the wholesale delivery expense record for O'Hare (RAPX 72, Account 723-023) and designated them as the selling expense (the expense related to the activities of Borden salesmen). He has then estimated the number of points sold to independent stores (thus eliminating A&P sales and sales to schools and other non-store customers from consideration). He then divided the expense selected by those estimated independent store points to arrive at a "branch selling expense per independent store point." (RAPX 233, pp. 23 and 16; Tr. 8492-8494).

(i) Mr. Havemeyer Did Not Consider General Expense of "Missionary Work" In His Allocation: Mr. Havemeyer's allocation herein is based on the assumption that the "entire time of the salesmen was spent in soliciting these particular store accounts [all non-A&P stores] and serving these accounts." (Tr. 8494). The record reveals that this is a false premise.

A&P called Mr. Daube, a Borden executive, to substantiate Mr. Havemeyer's interpretations of the sales related expenses. Mr. Daube described the salesman's activities as follows: "He contacted new customers. He contacted existing customers. On occasion he could perform a credit function in that he might go out to collect money, if necessary. ... His basic function was to develop and obtain new business for the company." (Emphasis added). Daube, Tr. 9226-9227, See also Dischner, Tr. 7161-lines 14-19).

Therefore, it is clear that these salesmen did not spend all of their time with the existing, non-A&P, store customers. Their most important function was to obtain new business (missionary work). As noted by Mr. Lemberg, this part of the selling expense is a general expense of doing business on the part of Borden. It should then be borne equally by all customers (on a volume basis) and would not result in a cost differential. (Lemberg, Tr. 9419-9420). 80/

80/ Indeed, it would seem that A&P was receiving the principal benefit from this general business expense. This was obviously most directly related to plant volume and, therefore, to economies of scale at the plant. A&P was the customer on the cost-plus basis. (CX 62). A&P expected Borden to keep its costs down by improving economies elsewhere (CX 106B, first two full paragraphs). Moreover, it would appear from the facts of this case, where A&P was being sold product at below-cost prices (CX 87 A&B), that A&P was reaping the entire benefit, and then some, of this general cost of doing business.

(ii) Non-Store Customers Have Been Erroneously Eliminated: Mr. Havemeyer eliminated all volume delivered to non-store customers in his allocation of selling expense (Tr. 8496-8497). His basis for such elimination was his belief that the Borden salesmen on the wholesale routes would not call on bulk wholesale customers being served by those routes. He believed that Borden would have special bulk wholesale salesmen who would call on bulk customers, no matter which route served them. He admits that there is nothing in the record to support this assumption. (Tr. 8495-8497). Further, he admits that there is nothing in the Borden expense account that shows that the salesmen do not call on non-store customers who are served by the wholesale routes (Tr. 8497).

Again Mr. Daube was called upon to substantiate Mr. Havemeyer's assumption, and again he failed to do so. At several points in his testimony Mr. Daube indicated directly that where a wholesale route served some small bulk wholesale customers that the selling expense related to those accounts would be found in Account 723-023 the wholesale route expense account. (Daube, Tr. 9226, 9234, 9235, 9236). After much confusing examination by A&P counsel as to the general practices involved in Borden accounting procedures and Borden's policies with regard to the separation of bulk wholesale and wholesale routes (Daube, Tr. 9229-9246), Mr. Daube finally concluded: "I have no personal knowledge whether the salesmen's wages were charged to 723 or 725, allocated between the two accounts should there be a mixture of the types of business we are discussing." (Daube, Tr. 9246).

Again Mr. Havemeyer's experience and belief has not been substantiated by "supporting" Borden testimony. His expertise is found wanting. In the absence of any other evidence; and in view of Mr. Daube's tendency to place the expense of calling on such accounts on the routes which serve them (Daube, Tr. 9226, 9234-9236); it must be assumed that the wholesale delivery expense account (723-023) applies to all customers served thereon, even if some of those customers are non-store (and possibly bulk) wholesale accounts.

Accordingly, Mr. Havemeyer's elimination of non-store volume is erroneous and overstates the amount of expense to be allocated to stores.

(iii) Record Does Not Support The Position That Salesmen Did Not Call On A&P Stores: Over and above the question of the expense of Mr. Tarr and his assistant, or the time of other Borden executives spent on the A&P account, the record simply does not accord with Mr. Havemeyer's position that salesmen never called on A&P stores. Mr. Havemeyer's position is based upon the terms of the

Borden-A&P contract. However, that contract provides that "Borden salesmen's services will be supplied at the store level only, to follow through on a complaint covering such matters as service, product or container." (Emphasis added). (CX 62Q).

Thus, Borden salesmen were to call on A&P stores, but only to handle complaints. However, Mr. Havemeyer has made no study of the time spent in this function for A&P. He has merely eliminated A&P volume entirely from his consideration. (RAPX 233, p. 23). This simply is not warranted, based on the record evidence. Therefore, the elimination of A&P from the calculation of selling expense is erroneous.

(iv) Evidence Shows Selling Expense Is Vastly Overstated for Competitors: Mr. Havemeyer's allocation of selling expense, as noted above, is based on the philosophy that the total time of the salesmen was spent with existing, non-A&P, store customers. (Paragraph i, above). This erroneous basis has resulted in expectedly ridiculous conclusions. For example, Mr. Cox of Jim's Grocery testified that the Borden salesman visited him "Maybe once a week, maybe once a month." (Cox, Tr. 3992). It is apparent that the salesman did not spend a substantial amount of his time with this customer. 81/

81/ Another O'Hare route customer, although not noting the frequency of visits, indicated that the Borden salesman was nothing more than a "goodwill ambassador." (Lasorso, Tr. 2699).

However, if Mr. Havemeyer's methodology were correct, this slight effort would cost the Borden company in excess of $165.00 per month. 82/ This is more than the weekly salary of a Borden salesman (CX 119J) and is obviously way out of proportion of the facts. Of course, the many errors made by Mr. Havemeyer, as outlined above and below, lead to this obviously erroneous conclusion.

(v) Mr. Havemeyer Has Not Studied the Sales Expense of Mr. Tarr and His Assistant: Mr. Havemeyer admits that in allocating selling expense, he has made no study of, or allocation of, the selling expense of Borden involved in the activities of Gordon Tarr and the salesman who assisted him in servicing the A&P account. (Tr. 8503). Yet the record shows that Mr. Tarr spent almost all of his time, both before and after the private label contract, in serving the A&P account (Tarr, Tr. 845-846, 897-899). There was also at least one other sales representative who was similarly engaged with the A&P account, *after* the beginning of private label sales. (Tarr, Tr. 898-899).

82/ This dollar expenditure is calculated by taking the cost per point of $.016036 (RAPX 233, p. 23) and multiplying it by the number of points taken by this customer in March 1966 as estimated by Mr. Havemeyer. For the latter figure, see RAPX 233, p. 31, which estimates the sales to this customer as 4,593.50 points for a two week period. This must be multiplied by 2.25 to arrive at the monthly figure, which is in turn multiplied by the cost per point to arrive at the cost per month.

A cost study which fails to take into account the effects of countervailing costs incurred for the favored customer only is obviously defective. Such a study cannot show a true cost difference. (Lemberg, Tr. 9422).

(vi) Store Points Used In Allocation Are Unreliable: Mr. Havemeyer has determined the selling cost per point by dividing the selected costs by the "total independent store points." (RAPX 233, p. 23). Such independent store points were estimated based upon an analysis of the route books for Routes 3W, 13W and 18W. (See RAPX 233, p. 8, footnotes B and F; also RAPX 180). There has been no showing of record that the stores on these three routes are typical of the dollar value/point used to calculate points for all independent stores on all 17 wholesale routes. Absent such showing Mr. Havemeyer's estimated sales point value bears very little substance.

(vii) The Amount of Selling Expense Has Been Overstated: Mr. Havemeyer has included three sub-accounts among selling expenses which the record shows do not belong there; at least in substantial part. 83/ These are sub-account 36-Travel Expense, sub-account 08- Borden Welfare, and sub-account 50-Other Expenses. (RAPX 233, p. 23).

83/ All of these expenses have been taken from RAPX 72, Account 723-023, the Borden wholesale delivery expense account for the O'Hare Branch. (See RAPX 233, p. 16).

In the case of travel expense, he was of the opinion that it could not be the expense of the routemen, since this was covered elsewhere. Therefore, he reasoned that it must be for the salesmen. (Tr. 7608). He did not believe that any of it could be for route supervision, since his experience indicated that supervisors usually go out in spare route trucks (Tr. 7608-7609). He admitted he had no direct knowledge of Borden's practice in this regard (Tr. 7609). As noted in Finding 9(f)(iii) above, an attempt to substantiate this experience through Mr. Daube failed. Mr. Daube admitted that, to the extent the travel of Mr. Pergler (the branch manager) was included in this sub-account, it includes travel in connection with any of his functions related to delivery on the store wholesale routes (Daube, Tr. 9216-lines 13 to 21). Mr. Pergler, as manager, performed supervisory duties at O'Hare, as well as some sales functions (Pergler, Tr. 5627-5629; Daube, Tr. 9211). Thus a portion of this "travel expense" must be attributed to supervision of the wholesale routes and is improperly included here. 84/

The inclusion here of the category "Other Expenses" involves similar error. This inclusion as a sales expense is based upon Mr. Havemeyer's interpretation of the

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84/ In May 1965 Pergler's travel amounted to over 1/3rd of this sub-account (Tr. 7609-7610). There is no break-down of these expenditures in the March 1966 account (see RAPX 72, Account 723-023), but it must be assumed that a substantial part of this expenditure is still Mr. Pergler's.

testimony of the branch manager, Mr. Pergler, in connection with "petty cash" (Tr. 7611). Mr. Pergler had testified that none of the "petty cash" disbursements were used for the service of A&P (Pergler, Tr. 5651). However, Mr. Pergler did not testify that such "petty cash" disbursements were made for any other store customer (Pergler, Tr. 5651). On this state of the record it is obvious that "petty cash" cannot be allocated to either A&P, or other store customers. There is simply no foundation for such an allocation. It may have been used solely for non-store customers, or it may have been a general expense not directly related to any type of customer.

Moreover, in the May 1965 account, where the entries under this sub-account (723-023-50, Other Expenses) were identified, only about one-quarter of such "other expenses" were identified as "petty cash." (RAPX 71, Account 723-023-50). Mr. Havemeyer has, of course, used the entire sub-account as if it were petty cash. (RAPX 233, pp. 16 and 23). 85/ Obviously, no more than a quarter of this expenditure can be considered to be "petty cash" on the basis of this record.

85/ Again Mr. Daube was called upon to substantiate Mr. Havemeyer's position and again he failed to do so. When asked what "Other Expenses" included, he stated simply "it would relate to other costs not detailed in the other details relating to delivery expenses for store wholesale accounts." (Daube, Tr. 9182). He did not say it was all "petty cash." (Daube, Tr. 9182).

Finally, the inclusion of "Borden Welfare" under selling expense appears to be totally unwarranted. There is no showing whatsoever that this is related to the selling expense. Therefore, there is no basis for deducting this amount from the delivery expense and padding the selling expense. In fact this is contrary to Mr. Havemeyer's own procedure in RAPX 232, where he allocated this item as a part of delivery expense. (RAPX 232, p. 79).

In sum, Mr. Havemeyer has included a number of expenses as "selling expenses" which simply do not belong in this category. To this extent he has overstated the amount of expense to be allocated under this function.

(viii) Other Products Improperly Included: As noted in connection with other functions above, Mr. Havemeyer has improperly compared costs of competitors on the basis of the entire product line purchased. He should have determined cost solely on the basis of the 11 items sold to A&P under private label. [See Findings 15(a)(iii) and 15(b)(viii), supra.]

(ix) Contradicted by RAPX 232: Mr. Havemeyer alleges in this study that selling expenses are not applicable to A&P. This position is contradicted by his allocations in RAPX 232, discussed above. In that study he did allocate some selling expense to A&P private label. [See Finding 9(g)(vi), above; and RAPX 232, p. 93.] This is another indicia of error.

(f) Attachment 7 -- Advertising Expense: Mr. Havemeyer has allocated advertising expense equally per point to all units of Borden label product sold to stores only, including both A&P and other stores. He has excluded all sales to non-store customers and those of private label to A&P. (RAPX 233, pp. 24-25).

(i) No Basis For Exclusion Of Non-Store Sales: Mr. Havemeyer has, without any evidential basis, excluded all non-store sales points as being unaffected by Borden advertising (RAPX 233, pp. 24-25; Tr. 8504-8523). This is done in the face of record evidence showing that such advertising expenditures do apply to such sales in that Borden's accounting records (according to Mr. Havemeyer) apply such an expense to those non-store sales (RAPX 75; Tr. 8520). Furthermore, there can be no doubt that all of such sales are of Borden label. Since there is no record showing, of any nature, that they are not affected by the Borden advertising, they must be included in this allocation.

(ii) Institutional Advertising Would Apply To All Sales, Including Private Label: Moreover, to the extent that Borden advertising could be considered institutional advertising, it would apply to all Borden production, including private label. 86/ To this extent, such advertising is clearly a general expense of doing business; one intended to increase sales and consequently production. It is akin to the missionary work of salesmen and should be equally apportioned to all customers. (Lemberg, Tr. 9419, 9420). This is equally true, if not more so, in the case of A&P and private label.

Size of the dairy supplier was extremely important to A&P. In seeking a private label supplier it only contacted the major dairies who were large enough to supply its needs. (Schmidt, Tr. 1734-1736). Further, the ultimate contract with Borden was a "cost-plus" contract (CX 62) and A&P expected Borden to keep its costs down by improving economies elsewhere (CX 106B). Of course, with a brand new, highly modernized plant, the best possibility for minimizing costs for Borden was to introduce economies of scale through new business (CX 106B). Advertising was one means to attain that goal. Therefore, to the extent Borden's advertising was a general expense it was equally, or more, applicable to A&P's private label purchases.

86/ There is no showing in the record of the type of advertising included in this expense.

(iii) Mr. Havemeyer Has Overestimated Private Label Sales In His Calculations: The basic sales and cost data underlying this calculation relate to the Chicago Metropolitan Region of Borden, and are not limited to the O'Hare Branch (RAPX 233, p. 25; Tr. 8505). In eliminating private label sales from the total points of the Region, Mr. Havemeyer determined the Region private label sales on the basis of the proportion between private label sales and Borden label sales on wholesale routes in the O'Hare Branch (RAPX 233, p. 25, fourth section). He thus assumes that the experiences of the O'Hare Branch are those of the entire Region (RAPX 233, p. 25). This simply is not the case.

The greatest bulk of the A&P stores and the sales volume involved under the Borden-A&P contract was in the Chicago-Calumet area (CX 36, 50, and 62). It is to be expected therefore that the ratio of A&P's private label sales is higher as a percentage of total sales in this area. The use of O'Hare as representative of the rest of the Region would, therefore, overstate the amount of private label sales on a regional basis and increase the advertising cost per point on the limited class of sales points to which Mr. Havemeyer has applied it. (Of course, as noted above, Mr. Havemeyer's limitation of this allocation to Borden label store points is itself erroneous.)

(g) Attachment 8 - Merchandising Expense

In this allocation, Mr. Havemeyer has taken an expense item from a Chicago Main Office account (RAPX 72, Account 730-032) entitled "Merchandising" and allocated it to certain selected points. He applies this to independent store points only. The independent store points for the Chicago Region are estimated on the basis of the relationship between such independent store points and total wholesale points in the O'Hare Branch. (RAPX 233, p. 27; Tr. 8523-8527).

(i) No Showing That Merchandising Expense Does Not Apply to Bulk Wholesale and Other Non-Store Points: There is absolutely no evidence of record to show that the merchandising expense of the Chicago Central Office should not be applied to bulk wholesale and non-store business. It must be remembered in this regard that this is a Chicago Main Office expense (RAPX 68 gives this location for the number 730) and is not directly associated with any particular branch or class of routes. Since there is an entry for wages, this expense is apparently related to the functions of one or more employees in the Chicago Central Office. (See RAPX 72, Account 730-032.) Moreover, of the various entries included in this account, only one minor item showing a total expenditure of $86.15, over a 3 month period, appears to bear any peculiar relationship to store sales; that is, "store decorate." All of the other expenses entered thereon could apply to any type of business. (RAPX 72, Account 730-032).

The burden is on the proponent of any item of evidence to prove its reliability and substance. In this instance A&P has obviously failed in this burden. The bald assertion by Mr. Havemeyer that these merchandising expenses apply solely to store sales in certain of Borden's Chicago Region branches bears no weight as against the accounting records of Borden which show a broader coverage. If these were branch expenses and related to store sales on the wholesale routes, the account would be related to those branch routes, not the Chicago Central Office. Without further substantitating evidence as to what is involved in these expenses, A&P simply has not met its burden of proof.

(ii) No Basis For Excluding Retail and Vendor Sales: Similarly, there is no basis for excluding retail and vendor sales, or any other class of sales from this allocation. (See RAPX 233, p. 27.) Since it is a Central Office expense it is, on its face, applicable to the entire operations of the Chicago Metropolitan Region (RAPX 68, Location 730). Reviewing the particular expense record (RAPX 72, Account 730-032) it can be seen that the largest identifiable expense item included therein is "Merchadise Give Away." It is clear that this type of activity is not peculiar to store sales. (RAPX 72, Account 730-032). Merchandise give away is a common merchandising scheme in any sales activity, including retail home delivery.

Again, Mr. Havemeyer has failed to come forward with any evidence to show that this and other merchandising activity were peculiar to store sales. The burden of proof has not been carried.

(iii) *Mr. Havemeyer Has Again Misinterpreted Borden's Records*: Mr. Havemeyer interpreted the records of Borden to show that a Chicago Main Office Account would not apply to the Hammond Branch and the various "trailer runs" in Indiana. He has, therefore, not considered them in his calculation. (Tr. 8537, 8529-8530). He based this on the argument that RAPX 68 (a partial listing of Borden Location Numbers) shows the Hammond Office Location Number to be 801 and further, that a reference to Borden's chart of accounts for March 1966 shows no "operational" accounts under this number. (Tr. 8532). However, this argument is based upon a sloppy analysis of Borden's records.

RAPX 68, the partial listing of "location numbers," is for *May 1965*. As noted above in connection with earlier findings, there were some changes in Borden's accounts between

May 1965 and March 1966, the period we are now dealing with (Daube, Tr. 9208). An examination of RAPX 72 would have revealed that those changes included new location numbers for Indiana sales. RAPX 72, Locations 781, 782, 783, 784 and 785 are Indiana "location numbers" showing expenses for Hammond (wholesale, factory and retail), Hammond distributors, Hebron, South Bend and Warsaw respectively. (RAPX 72). It would also appear that there were "location numbers" for trailer runs operated out of Woodstock and Hammond which could not be identified and were not, therefore, included in RAPX 68, the partial list of location numbers (Daube, Tr. 6719).

Further, Borden records generally include Hammond and the trailer runs within the Chicago Metropolitan Region, unless a specific notation is made excluding such sales. (See RAPX 69, 75, 76 and 77). Borden witnesses also referred to the Chicago Metropolitan Region as including Hammond (Daube, Tr. 6759, 6762 - see particularly the redirect).

Therefore, it is clear that Mr. Havemeyer was in error when he excluded Hammond sales and the Indiana trailer-run sales from his computations.

(iv) No Study Of Classes Of Customers: As in the case of delivery expense and product waste, above, it is apparent that merchandising expenditures may vary as between different classes of customers. Mr. Havemeyer interprets merchandising as being "at-store support . . . such as promotional material that might be used there, equipment that was given or loaned to display products, that nature." (Tr. 9138). Although only one small entry in March 1966 fits this description (RAPX 72, Account 730-032), it is clear that this type of support would not be granted uniformly to all customers. The larger, better financed stores may have much less need for much of this support.

In the case of the two independent store-owners from the O'Hare routes who testified, neither received any equipment in connection with their milk purchases (Lasorso, Tr. 2711-2715; Cox, Tr. 3994). Each did receive some promotional material and aids (Lasorso, Tr. 2699, 2701; Cox, Tr. 3992, 3994). The testimony of Mr. Lasorso, the owner of Mayfair Foods, indicates that promotional material was not provided on a frequent or regular basis (Lasorso, Tr. 2701-2702). This is supported by the expenditures in Account 730-032, which show no expenditures under the item "Merchandise Card & Sign" for March 1966, and only $230 for the "year to date." (RAPX 72).

Thus, it is obvious that this expense does not apply to all classes of stores uniformly. Yet Mr. Havemeyer made no study of the varying experiences of the different classes of customers. (Indeed, he made no differentiation between any of the independent stores on the basis of type, size or volume of purchases.) This failure constitutes serious error.

(v) Such Errors Lead To Ridiculous Results: The ultimate proof of such errors is found in Mr. Havemeyer's results. The two stores noted in paragraph (iv), above, are a good example. Despite the paucity of expense in this category, as revealed by their testimony [see paragraph (iv), above], Mr. Havemeyer's methodology results in Mayfair Foods being charged with a monthly merchandising expense of $100.82 and Jim's Grocery (Mr. Cox) being charged with a monthly merchandising expense of $89.20. (RAPX 233, pp. 27 and 31). 87/ The record just will not support such results.

(h) Attachment 1-General Selling and Administrative Expense: In this allocation the witness took the sum-total of all other functional expenses which he had allocated to O'Hare custers in Attachments 2 through 8 and divided this total into the "overhead cost" which he had selected from

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87/ These figures are obtained by multiplying the "expense per point" computed by Mr. Havemeyer on p. 27 of RAPX 233 by the monthly sales points. The monthly sales points are, in turn, obtained by multiplying the two-week volume found on p. 31 of RAPX 233 by 2.25.

among Borden's Central Office accounts. (RAPX 233, pp. 5 and 6). He then applied the resulting percentage figure to the total costs for the other seven functions which he had calculated for each of the competing customers and A&P (in the case of A&P under both categories-private label only and total purchases) to arrive at a "general selling and administrative expense" per point for each of said stores. (RAPX 233, pp. 39-66).

(i) Central Office Expense Related To More Than These Seven Branch Functions: It is quite obvious that Borden's Central Office staff was concerned with far more than just the branch functions to which Mr. Havemeyer has applied this expense. 88/ Mr. Havemeyer's own calculations in RAPX 232 show that production costs, along with the cost of transportation to branches, far exceeds the expense of branch operations. Using his own figures, the production and transportation costs in May 1965 would total about $270,000 (RAPX 232, pp. 24, 33 and 39), whereas the O'Hare branch expenses in March 1966 were calculated as being about $82,000 (RAPX 233, p. 6). Since the Central Office is concerned with the totality of Borden's operation in this Region, it is obviously going to spend considerable time in seeing after this more expensive end of its functions. (Tr. 9703).

88/ The Seven branch functions are: loading, phyical delivery, branch clerical, product waste, branch selling, advertising and merchandising. (RAPX 233, p. 5).

Therefore a very substantial portion of Borden's Central Office expense should have been allocated to other functions of the company, such as procurement of raw milk (not included in above figures), production and transportation to branches. 89/ These functions are clearly related to volume; rather than service-connected. The portion of overhead expense related to them should therefore be allocated on a volume basis (equally to each point) and would not create any cost difference. It should therefore be excluded from the study.

(ii) The Expense Is Not Allocated On The Basis Incurred: Under Mr. Havemeyer's methodology, a very substantial amount of the overhead expense would be allocated on the basis of the time the driver spends at the individual store, since delivery expense is allocated on this basis. The percentage figure is, of course, applied to the delivery expense, as well as other branch functional expenses, to obtain the overhead cost. (RAPX 233, pp. 39-66). Yet it is obvious that the expense of the Chicago Central Office staff bears no relationship to the time the driver spends in servicing his customers.

Mr. Havemeyer admittedly has no personal knowledge of the functions and operations of the Chicago Central Office staff (Tr. 9701-9710, 9712-9714). No one from Borden was

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89/ See Federal Register, December 14, 1972, Vol. 37, No. 241, Part II, pp. 26680-26686 - requires allocation of home office expense directly to segments of the business to which they are related. Any residual must then be allocated to all of the business activities of the home office.

called to explain those functions and operations. Not even a minimum inquiry into those functions has been revealed on the part of Mr. Havemeyer or his staff. (Tr. 9701-9710, 9712-9714). This is another example of the faulty methodology employed by Mr. Havemeyer. 90/

(iii) Accuracy Of This Allocation Affected By Errors Cited Above: The errors cited above in connection with the various branch functions have a direct effect on both the total expense being allocated and the amount of such expense which is allocated to individual stores under Mr. Havemeyer's methodology. (Tr. 8536-8549; RAPX 233, pp. 5, 6, 9, 14, 19, 20, 22, 24, 26, 39-66). Each of these errors has a substantial impact and renders the allocation of overhead expense erroneous.

(iv) Ridiculous Results Prove Allocation Erroneous: The fact that Mr. Havemeyer's methodology in allocating overhead costs is erroneous is easily recognized when the results are calculated out in the form of monthly dollar expenditures for the individual stores. Jim's Grocery (James Cox) was a daily cash-basis customer (RAPX 233, p. 69). Mr. Havemeyer estimates his monthly purchase volume to be 10,335.38 points (RAPX 233, p. 31, multiply 2 week figure by 2.25 to get month's figure). The amount of Borden's home office expense on this one, cash-basis customer, is obviously

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90/ See Federal Register, December 14, 1972, Vol. 37, No. 241, Part II, pages 26680-26686.

going to be negligible. Yet according to Mr. Havemeyer's methods, this customer is credited with having generated about $41 in expense for the Borden home office staff in March 1966 (RAPX 233, p. 41-multiply overhead expense of $.003946 by monthly volume). This simply does not make sense in light of the nature of this customer, the volume involved and the fact that the expense being allocated is that of the home office, which obviously is not going to have any contact with Jim's Grocery store. 91/

(j) Price Data:

After his computation of various marketing costs, Mr. Havemeyer calculated the average list price per point, the average discount per point, value of the discount per point and the discount per point less than A&P. In making these calculations the witness included the entire product line purchased by competitors. For A&P, he made two calculations of price data: one based on private label only and one based on all products. (RAPX 233, pp. 39-66, 31, 33; Tr. 8556-8557).

(i) It Was Improper To Include Other Products In Price Determination: Mr. Havemeyer has included all products in his calculation of price data for competing stores. As noted in connection with a number of cost elements above, the inclusion of such other products constitutes error. The only products involved in the price discrimination in this case

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91/ Also see some of the other cash customers who are being charged more than 1/2 cent per point for home office expenses. (RAPX 233, pp. 60-63, 66, 69).

are the eleven items included in the Borden-A&P private label contract. The facts stated in Findings 15(a)(iii) and 15(b)(viii) above apply equally as well here, and are incorporated herein by reference.

(ii) Mr. Havemeyer Is Not Comparing Prices For The Same Commodities: Moreover, Mr. Havemeyer is not comparing prices on the same commodities in this part of the O'Hare study. He is comparing apples and oranges. He calculates a separate "average list price" for A&P stores and for each independent competitor. These are based on the separate product mixes purchased by each of these customers. (RAPX 233, pp. 31 and 33; Tr. 8562). Naturally, this results in different average list prices, from which he then determines the amount of discount per point received by each. (RAPX 233, pp. 39-66; Tr. 8560-8561).

Inherent in this methodology is the fact that he has not determined the list price on the same "product." The "product" involved for A&P in the "private label purchases only," differs from that in "A&P's total purchases," and both of these "products" differ from those involved in the purchases of the various competitors. Consequently, the "list prices" which are computed for each are entirely different. Thus the discounts computed from these three separate "list prices" bear no relationship and are not comparable. (See Tr. 8562, 8590-8593.)

The proper method would have been to first eliminate all products but the eleven involved herein and then, compare on the basis of either A&P's purchase mix, or that of the competitors (but not separately on each). 92/ Then the amount of the comparative discounts would have some meaning, since the discount would be applied to the same list price and not to two different list prices. The requirement of the Robinson-Patman Act is that a seller should not discriminate in price as between two competing purchasers in the sale of "commodities of like grade and quality." [Sec. 2(a), amended Clayton Act]. The commodities being compared in RAPX 233 are not the same commodities. The comparison is therefore improper.

(k) Mr. Havemeyer Did Not Study Special Costs Incurred For A&P Alone:

The record shows that certain expenses were incurred by Borden in connection with its dealings with A&P which were not incurred for other customers. Mr. Havemeyer should have studied these cost areas (Lemberg, Tr. 9421-9422), but he did not. Accordingly his study is defective. Some of these cost areas are as follows:

(i) Mr. Havemeyer Did Not Give Proper Recognition To The Expense Of The Services Of Mr. Tarr And His Assistant:

92/ This is the methodology which Mr. Havemeyer used in the Hammond study, where the price difference was determined on the basis of the competitors' purchases of the private label equivalent items only. (RAPX 234, pp. 3-10).

Gordon Tarr's principal duty was to service the A&P account (Tarr, Tr. 845-846, 897-899). There was also at least one other sales representative who was similarly engaged with the A&P account, after the private label contract began (Tarr, Tr. 898-899). Yet Mr. Havemeyer admittedly did not make any special study of this expense (Tr. 8550-8551) although he argues that he did include Mr. Tarr's salary in his allocation of overhead expense, since he presumes it is within the Central Office expense accounts (Tr. 8589-8590).

Mr. Havemeyer argues further that if Mr. Tarr and others spent a disproportionate amount of time on the A&P account, that there were others in Borden's central office who spent all or most of their time on non-A&P accounts. However, this is pure, unsupported supposition. He knows nothing of the operations of Borden's central office and cannot substantiate this theory. On this illusory basis he argues that his allocation of all central office expense as a percentage of other branch costs allocated to individual stores, properly accounts for the expenses of Tarr and others who spent disproportionate amounts of time on the A&P account. (Tr. 9701-9710, 9712-9714).

The record facts are these: Tarr and at least one other sales representative spent the vast majority of their time servicing the A&P account (Tarr, Tr. 845-846; 897-899) and there is no showing in the record of corresponding central office efforts for others (Tr. 9701-9710, 9712-9714). If there were any indication that extra expenses existed in serving the A&P account it was necessary that they be studied. (Lemberg, Tr. 9421-9422). There is even more than an indication in this instance and yet Mr. Havemeyer did not make any such study. His analysis of Borden's cost of serving A&P, as compared to its cost of serving others, is therefore deficient.

(ii) Mr. Havemeyer Did Not Give Proper Recognition To The Expense Of The Time Malone, Gose, Minkler and Others Spent On A&P Account: The same logic applies to the expense involved in the great amount of time of Messrs. Malone, Gose, Minkler, and others spent on continuing negotiations with A&P over the provisions of the Borden-A&P contract. All of such facts will not be repeated again here. 93/ Suffice it to note that the record shows that the A&P business represented over 55% of Borden's wholesale sales (RAPX 232, p. 91, Item 1) and that continuing dealings over the provisions of this important contract required a disproportionate amount of time of a number of top Borden executives (Minkler, Tr. 125-279; Tarr, Tr. 849-889; Gose, Tr. 1045-1063; Malone, DTr. 29-204; CX 12-14, 16-28, 35-37, 42-44, 52-58, 60-64, 72A-B, 75A-O, 75T-Z-5, 79-81, 84-90, 102A-C, 105-106, 108, 110A-D, 303A-H) including even some of Borden's corporate office personnel

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93/ See Finding 9(j)(ii), above in connection with RAPX 232 for a further statement of facts surrounding this error.

in New York City (Archer, Tr. 1209-1212, 1228, 1230; CX 5, 7, 9, 12, 16, 22, 44, 53, 55, 64, 66, 75, 80, 90-91, 108 and 292).

Again Mr. Havemeyer admits that no special study was made of this expense. By the same logic as that noted in paragraph (i) above, this makes Mr. Havemeyer's study defective.

(iii) Mr. Havemeyer Did Not Consider Extra Costs Of Production and Handling Incurred For A&P:

Early in the negotiations Borden was quite concerned with the possibility of cost problems with private label, if the A&P private label contract should expand beyond the six main items then under consideration. It was pointed out that these six items represented about 70% of A&P's total volume. It was noted that further expansion of the product line might cause problems in "plant efficiencies" and in "distribution material handling." In connnection with handling, it was feared that expansion of the number of items would seriously hamper the palletization process. (CX 7A-B; See also CX 14E).

The private label program was expanded to 11 products by the inception of the contract and even further, to at least 16 items, at a later date. (CX 62C; CX 197-Z-2). No study was ever made by Mr. Havemeyer to determine whether any additional processing and handling costs were incurred, as Borden feared

(Tr. 7515-7517, 7225-7526). Mr. Havemeyer insisted that he knew of nothing which would cause such extra costs (Tr. 7525-7526, 9718-9720). In the case of distribution handling, he thought that if there were extra costs they would be miniscule (Tr. 7517).

However, the problem was real enough to trouble the true experts; the Borden Management familiar with their day-to-day operations. (CX 7A-B). Mr. Havemeyer's own lack of knowledge of Borden's actual operations is well established in the above findings. The failure to consider these probable additional costs is a serious deficiency in Mr. Havemeyer's study. (Lemberg, Tr. 9420, 9422).

(1) Mr. Havemeyer's Determination Of Expenses Is Defective:

In each of Mr. Havemeyer's allocations, he allocated certain expenses on only one month's experiences of the Borden company without any determination that the expenses and credits included therein were typical or complete. (RAPX 72; RAPX 233, pp. 6, 10, 15-17, 11, 19, 20, 23, 27). 94/ As noted in a number of instances in connection with RAPX 232, this methodology does not even accord with his own instructions to Wisconsin dairies in a manual published in connection with that state's dairy trade laws. There it is explicitly stated that in reporting costs

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94/ The one exception to this is the advertising expenditure, where he started with the annual average advertising expenditure per point for the Chicago Region for 1966.

"a period of sufficient length should be selected to cover cycilical and seasonal fluctuations but yet represent current methods. Thte month in which the price action occurred that triggered the complaint or investigation must be included." (Tr. 9135-9136). Similar requirements are given in other parts of this manual (Tr. 9134-9135). The obvious logic of such a rule is compelling, yet Mr. Havemeyer did not make any study of the typicalness or completeness of his record basis, let alone produce records over a significant time period. (Tr. 8266-8268, 8268-8269, 8371-8374). Mr. Havemeyer's determination of expenses is therefore defective. 95/

(m) Checking Procedures Defective:

As noted in Finding 9(k) *supra*, in connection with RAPX 232, Mr. Havemeyer's checking procedures to determine the accuracy of his work were defective. The facts stated in that finding are incorporated herein by reference. This failure makes Mr. Havemeyer's work even more unreliable.

95/ As an example of the consequences of such limited review of Borden's cost experiences, Locations 730-015, 730-018 and 730-019, all of which are used by Mr. Havemeyer in the allocation of overhead expense (RAPX 233, p. 6), show marked disparities in amount as between May 1965 and March 1966, the only periods for which A&P produced such records (RAPX 71 and 72). The total of these three expenses in March 1966 was $46,509 (RAPX 233, p. 6), while in May 1965, they totalled only $28,817 (RAPX 71, Accounts 730-15, 730-18, and 730-19). Obviously, these and the other accounts required greater study to determine typicalness, completeness and the presence or absence of irregularities.

(n) Witness Frequently Unable To Substantial His Opinions:

Similarly Finding 9(1) is incorporated here again by reference in connection with the O'Hare Study. Additional citations to Mr. Havemeyer's failures to substantiate his opinions are: Tr. 8261-line 16, 8268-lines 7-8 and 16-25, 8269, 8274-lines 10-16, 8374, 8476-lines 8-10, 8490-lines 8-25, 8497-lines 2-10).

As noted in Finding 9(1) it is incumbent upon an "expert" witness to be able to give the basis for his determination when called upon to do so. Mr. Havemeyer has frequently been unable to do so in connection with important steps in his allocations. His studies are, consequently, not entitled to any weight.

(o) Use of Average Figures For A&P Is Erroneous:

Mr. Havemeyer's methodology masks over the fact that some of the A&P stores took very low volumes. (See RAPX 232, pp. 48-49, 61-62, 67-68, 69-70, showing four A&P stores who took 20 cases or less per delivery and compare with the other A&P stores represented in RAPX 232, pp. 46-73). 96/ The averaging of all A&P stores blends-over partial cases and thus increases the number of points per case, which is an important part of

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96/ In connection with the case figures on these pages of RAPX 233, it is important to note that they are obviously inflated. A casual inspection of pages 46-73 will show that a partial case of any one product on any given day is always counted as a full case.

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Mr. Havemeyer's methods of allocating certain costs such as loading expense and delivery expense (RAPX 233, pp. 8, 10). It also raises the volume delivered to these and other low-volume stores (See RAPX 74), which materially affects the amount of fixed costs allocated to points delivered to such low volume stores (since the same fixed costs will be allocated over a greater number of points). (RAPX 233, p. 10).

It is clear from the record that not all A&P stores belong in the same class. RAPX 74 shows that in March 1965 there were A&P stores taking rather small volumes. This is reinforced by the section of RAPX 232 cited above. Moreover, CX 62T reveals that some A&P stores were too small to order merchandise in even cases. Despite these facts Mr. Havemeyer has made no study to determine whether there were different classes of A&P stores, based on size, type and purchase volume of the store. This must be considered a substantial defect in his study.

(p) No Study Of Classes Of Stores:

In fact, Mr. Havemeyer has completely ignored the question of different classes of stores, whether he was dealing with A&P or its competitors. The only differentiation he has made is on the basis of whether they were "limited service" or "full service customers" and his analysis of even this question leaves much to be desired. [See Findings 15(b)(vi) and (vii) above.] Yet it is clear that different sizes and types of stores differ in their enjoyment of a number of the functional elements of Mr. Havemeyer's cost study, such as physical delivery, branch clerical, product waste, merchandising and possibly others. Purchase volume also will have a bearing on many of these things - including what type and size of store is involved. (Abrams, Tr. 6425-6427; Dr. Solverson, Tr. 1551-1552, 1554-1555).

Mr. Havemeyer's only previous experience with a Robinson-Patman cost justification study in a litigated case was rejected by the Court for his failure to properly classify customers. (Tr. 7685). He has repeated that error in the present studies.

(q) "Limited Service" Contract Cannot Be The Basis For Cost Justification In This Case:

The vast bulk of the savings claimed by Mr. Havemeyer are directly attributable to the difference in service requirements which he alleges existed under the Borden-A&P private label contract. Cost differences which he alleges in connection with physical delivery, product waste, selling expense and merchandising expense are due to the alleged differences between "limited service" and "full service." (RAPX 233, Attachments 3, 5, 6 and 8).

Yet, as was noted in Finding 15(b)(ii) above, the real difference in this instance was in the terms on which this "limited service" was made available to competing purchasers. With A&P, a very substantial price cut was granted in connection with "limited service" (CX 65). In the offer of the same service limitations to competitors, only 2% additional discount was granted (CX 123A-B; CX 138). By Mr. Havemeyer's own

testimony it can be seen that the latter discount was simply not sufficient to make "limited service" really *available* to competitors (Tr. 8334-8336).

Therefore, the difference, if any, in this case is one of *availability*, *not of service*. The service provisions of the Borden-A&P contract are part and parcel of the discrimination; not a justification for it. The terms of service in this case cannot be separated from the price. They were not offered separately. They are dependent on each other. A realistic look at the facts reveals that there is only one *real difference* in the Borden treatment of A&P, as compared to the competitors -- *that is, one of price*.

A&P's cost justification position amounts to this; "A buyer may legally discriminate in price, if he wraps up the price package in service terms and offers the same service terms to others at a much higher, unattractive price, which the others cannot accept. The difference in service terms will then justify the price difference." Such logic is clearly contrary to the meaning and intent of Section 2(a) of the amended Clayton Act.

16. Mr. Havemeyer's Study Is Unreliable:

In view of all of the above defects in Mr. Havemeyer's O'Hare Study, RAPX 233 must be considered unreliable and should be accorded no evidential weight. A&P had the burden of establishing the substantiality and reliability of the cost evidence which it introduced. It is clear that it has failed in this burden. Thus A&P has failed to rebut the cost evidence introduced by complaint counsel showing that the price discriminations were not cost justified.

D. The Hammond Study

17. RAPX 234: 97/

This exhibit purports to be an analysis and comparison of Borden's cost of serving A&P stores, as compared to five competing purchasers, representing eight store locations, on Borden's Hammond, Indiana Branch and in Valparaiso, Indiana in October, 1969. The alleged cost difference is then compared with a computed "net difference in price" to determine a "net discrimination in favor of A&P." (RAPX 234, pp. i and ii, 3 through 10). The cost elements considered in this comparison are: truck loading, physical delivery, branch clerical, product waste, branch selling, credit loss, advertising, merchandising and general selling and administrative expense. (RAPX 234, pp. 3-10).

18. Purports to Show That the Indiana Price Discriminations In Favor of A&P Were More Than Cost Justified:

This exhibit, along with the underlying exhibits which it "corrects," purports to show that the lower price granted

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97/ This is the final "corrected" summary copy of this set of calculations. The original exhibits to which the witness' testimony refers are: RAPX 182-196, RAPX 219-221, RAPX 223-227, RAPX 229, and RAPX 238.

to A&P, as compared to the prices charged to competing retail grocers, was more than cost justified as a result of alleged differences in the cost of serving such accounts.

19. Intended to Rebut Contemporaneous Borden Internal Accounting:

Borden's internal accounting papers, prepared after the inception of the private label contract, show that Borden was selling to A&P at prices which were below its costs (CX 87A-B) and, that otherwise Borden's business was profitable (CX 206A-D). RAPX 234 is intended to rebut that evidence.

20. Mr. Havemeyer's Calculations - Hammond:

Mr. Havemeyer's calculations in RAPX 234 deal with stores served by Borden's regular wholesale routes operated out of the Hammond Branch, as well as with two stores (an A&P and a Tittle store) located in Valparaiso, Indiana and served for Borden by an independent contractor. There are some differences in methodology as between his allocations dealing with the former and the latter. (RAPX 234; RAPX 185; RAPX 187). Therefore, such allocations will be dealt with separately herein.

The Hammond area study (excluding Valparaiso) is broken down as follows:

(a) Truck Loading:

The truck loading cost was allocated here in the same manner as in the O'Hare study, except that only the private label and private label equivalent items were used in his allocation of this expense to the customer. He first determined the labor cost for truck loading from Borden's accounting records and then estimated the total number of cases loaded on the Hammond wholesale routes. He divided the number of cases into the labor cost to arrive at a loading cost per case. (RAPX 234, p. 78; RAPX 185, p. 125). This was then applied to the individual customer on the basis of the number of points per case (of the private label or private label equivalent items) to arrive at a loading cost per point for A&P stores and the individual competing stores. (Tr. 8616-8618). This cost came out virtually the same for each customer; with Mr. Havemeyer going to four decimal places in order to obtain a very slight difference. (Tr. 8616-8618; RAPX 234, pp. 3-9).

(i) Allocation Improper -- Loading Expense Not Incurred In This Manner: Again, as in RAPX 233 (the O'Hare Study), the methodology employed in this allocation creates a cost difference, albeit infinitesimal, where no cost difference can exist. He has allocated this expense as if the orders were loaded on the truck in the form delivered into the store; that is, in accordance with the product mix which is ultimately purchased by each store. However, it was not loaded that way. It was loaded on pallets, with no separation out of the individual store orders. (Pergler, Tr. 5695-5696).

As noted by Mr. Lemberg the loading expense was "incurred equally per unit of product, per unit of gallons, per unit of half-gallons, per unit of quarts ... Because they are all loaded the same way, which is just haul it out of the cooler and put it on the truck." (Lemberg, Tr. 9413).

Finding 15(a)(i) above goes into some detail why Mr. Havemeyer's methodology is improper. Those facts are incorporated herein by reference and will not be repeated here. However, it should be noted that the expense was not incurred in the manner implicit to Mr. Havemeyer's methodology. If the expense were properly allocated it would apply equally to each unit of product and could not give rise to a cost difference. (Lemberg, Tr. 9413).

(ii) The Allocation of Loading Expense Conflicts With Section 2(a) of the Robinson-Patman Act: As pointed out in Finding 15(a)(ii), Mr. Havemeyer's methodology does not take into account a difference in "method of delivery" or "quantity of delivery"; the only two criteria for cost justification under Section 2(a) of the amended Clayton Act. His method depends rather upon the product mix taken by the individual stores. Since this is not a proper basis for cost justification under the Act, it cannot be allowed. 98/ The allocation

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98/ See Finding 15(a)(ii) for a more detailed outline of the facts.

of truck loading cost is, therefore, improper. It should not result in any cost justification, but rather should apply uniformly to each unit of product. (Lemberg, Tr. 9413).

(iii) Some Costs Are Omitted: The witness admitted that the truck loading expenses which he selected include only wages of employees. He admittedly did not take into account any building expenses, land, refrigeration, loading machinery, repairs or other expenses associated with loading. (Tr. 8618-8619).

Instead he has left all of such expenses in the delivery account and allocated them as part of the delivery expense, where his methodology would find the greatest cost difference. (RAPX 234, pp. 78, 80, 81; Tr. 8619-8620). If they had been properly included in loading expense, they could not have resulted in any cost difference (Lemberg, Tr. 9413) and the delivery expense would have been reduced accordingly.

Mr. Havemeyer argues that these expenses were not broken out on Borden's accounting records and that, accordingly, he could allocate all to delivery expense (Tr. 8618-8619). This is merely an abdication from his duty to make an adequate study. He admittedly never inspected the Hammond operations and, therefore, had no personal knowledge of such operations (Tr. 8620). Failing this he should have at least made some allocation of the building and related expenses to the functions to which they apply, even if it were somewhat arbitrary. It simply is not correct to lump all such expenses under the category which gives the greatest cost differential; especially where some of the functions should give rise to no cost difference at all. (Lemberg, Tr. 9409-9411, 9465-9466; also see admissions of Mr. Havemeyer at Tr. 8622).

(iv) Possible Extra Costs In Loading A&P Products Not Studied: In Finding 15(a)(viii) above it was pointed out that extra handling was required for A&P in the loading process. The testimony of Mr. Pergler as to the loading procedures at O'Hare must be deemed applicable to the Hammond Branch as well, since no other evidence was produced as to loading procedures elsewhere. (Pergler, Tr. 5697-5698, 5700, 5702-5704, 5707). Accordingly, the only evidence of record shows that extra work in the form of mixing labels and pallets had to be done specially for A&P. (Pergler, Tr. 5697-5698, 5700, 5702-5704, 5707).

Despite this fact Mr. Havemeyer has never studied, or even observed the Hammond loading operations to determine the extent of this extra effort (Tr. 8620). His study is therefore defective. (Lemberg, Tr. 9421-9422).

(b) Physical Delivery:

As in RAPX 233 (the O'Hare Study) Mr. Havemeyer has lumped together several categories of expenses under the term delivery expense. He has included automotive, building (non-labor) and labor (including supervision) in the category of physical delivery expense. This data was used along with his so-called "time-standards" to arrive at a cost per serving minute. (RAPX 234, p. 84). This was then to be applied to the individual stores on the basis of service time per point, which was also based on his time-standards. (RAPX 234, pp. 18 and 78; Tr. 8669-8670).

As in the cases of RAPX 232 and 233, Mr. Havemeyer has failed to produce competent evidence to support his assumption as to time. Consequently, a great portion of this section of his study has been excluded -- the total serving minutes per route day used to determine the "cost per serving minute" and the computation of the "service time per point" for each customer. The only items left in evidence in the physical delivery calculations are his cost figures for automotive, labor and non-labor expenses. (RAPX 234, p. 84).

The exclusion of the results of the physical delivery computations eliminates most of the "justification" determined by Mr. Havemeyer (RAPX 234, pp. 3-10).

(i) Premise of Allocation -- That A&P Required Less Service Time: The basis for this whole allocation is Mr. Havemeyer's allegation that A&P required much less service time per unit of product than did its competitors (with the exception of Wilco Food Center). (RAPX 234, p. 18). The witness did not make any study of the comparative times taken to serve the A&P stores and their competitors, but instead, attempted to apply so-called "time-standards" for which he was unable to produce substantiating evidence. (Tr. 8663-8667; See also "Order Supplementing and Modifying Order of September 11, 1974 Re Mr. Havemeyer's Cost Justification Exhibits," dated September 16, 1974). 99/

(ii) Mr. Havemeyer's Categorizations Of Customers As to Type Of Service Are Arbitrary and Unfounded: Mr. Havemeyer admitted that in the designation of customers as "full service" or "limited service," he classified A&P's competitors as "full service" if they took any of the additional services over and above those listed by Mr. Havemeyer as being included under "limited service." (Tr. 8666). However, this same principle did not hold true in the case of A&P, despite the fact that at

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99/ Further, his application of the "time-standards" depended on his designation of a store as either "full service" or "limited service." His designations of the individual stores was quite arbitrary, as will be more fully discussed below. (See Tr. 8665-8668).

least two additional services, route bookkeeping and special deliveries, were shown to be performed for the A&P stores (Tr. 8667-8668; Sczcepaniak, Tr. 1294; RAPX 94-100).

Further, only two customers in the Hammond area, Wilco Food Center and K-Mart, were designated by Mr. Havemeyer as receiving "limited service." (RAPX 234, p. 11). However, Mr. Sczcepaniak, the Assistant Route Foreman of the Hammond wholesale routes, tells an entirely different story.

Mr. Sczcepaniak testified that all of the unfavored competitors included in the case-in-chief 100/ received the same type of service as the A&P stores on the Hammond routes, with the exception that they did not pre-order. (Sczcepaniak, Tr. 1286-1294). Even in the case of pre-ordering he minimizes the difference by noting that the driver knew from experience ("by the buildup in his book") the approximate amount that each store would need each day (Sczcepaniak, Tr. 1294).

Mr. Havemeyer, however, has picked upon a few slight deviations from the normal delivery procedure, as revealed in the testimony of representatives of those competitors, to characterize their service as full service. (RAPX 234, p. 11).

100/ The unfavored competitors included in complaint counsel's case-in-chief were: Burger's Food Market, Model Food Center, Wallies Market, Wilco Food Center, and the Joseph Tittle & Sons stores (hereafter Tittle).

During the cross-examination of Mr. Kristoff, President of Burger's Super Markets, he stated that the Borden driver would rotate stock in the cooler, check the dairy case, rotate stock in the dairy case, take back outdated merchandise, and make special deliveries to the Burger's Food Market. (Kristoff, Tr. 2324-2325). However, a fuller explanation of these things on re-direct revealed that the Borden driver did not rotate the stock in the dairy case on a day-to-day basis, nor did he ever completely stock the case (Kristoff, Tr. 2426-2427). In fact, Burger's had an employee who was in charge of rotating and caring for the dairy case. On a day-to-day basis, it was this employee who rotated the stock. (Kristoff, Tr. 2431-2432). Ninety-nine percent of the milk delivered to Burger's was simply wheeled into the cooler (Kristoff, Tr. 2427). Similarly, he stated that the occurrence of out-of-date merchandise was "very insignificant" and "infrequent" (Kristoff, Tr. 2431). As for special deliveries, Mr. Kristoff said that such deliveries were very rare -- only one or two a year at the most (Kristoff, Tr. 2426). 101/

In a similar vein, Mr. Manley Minard, General Manager of Tittle stores, stated that: the Tittle stores "on occasion", received special deliveries, and "on occasion" the driver

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101/ In this regard, Mr. Sczcepaniak testified that A&P stores in the Hammond area continued to receive special deliveries after the private label contract was in effect. (Sczcepaniak, Tr. 1294).

would place the milk in the dairy case, and "on occasion" the driver would rotate the stock (Minard, Tr. 3207). He also said that Borden ran the risk of spoilage (Minard, Tr. 3208). However, he later explained that there was a "very small volume of out-of-date merchandise. Sometimes there was damage, or a particular product that would go bad, but very rarely out-of-date." (Minard, Tr. 3258). 102/

Mr. Barnes of Wallies Market testified that the Borden driver delivered milk to the cooler, but would haul some out to the dairy case "if we were low on a particular item out there." However, the driver did not put milk in the dairy case. (Barnes, Tr. 3869, 3908). He also stated that the milk was rotated in the cooler, there were some special deliveries and that Borden assumed the risk of spoilage (Barnes, Tr. 3909-3910). However, the witness had no idea how much spoiled product, if any, was returned and stated that he had only received special deliveries "a few times" (Barnes, Tr. 3932-3933).

In the case of Model Food Center the witnesses revealed that the Borden driver delivered the milk to a back room holding cooler and did nothing more. The driver did not

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102/ Of course, defective merchandise was returnable under the private label contract also. (CX 62P-Q).

rotate milk in the display case (Peters, Tr. 3844-3845). It was also stated that Borden took the risk of spoilage (Barney, Tr. 3814), but that the amount of out-of-date merchandise was "relatively small" (Barney, Tr. 3838).

Of course, Wilco Food Center even satified Mr. Havemeyer that it received "limited service." (RAPX 234, p. 11).

In the case of A&P stores in the Hammond area, no-one was called to testify as to the exact nature of the service received. Mr. Havemeyer relied solely upon his interpretation of the Borden-A&P contract. (CX 62; RAPX 234, p. 11). Although it was shown, as noted above, that there were at least two variations from the contract provisions -- route bookkeeping and special deliveries (RAPX 94-100; Sczcepaniak, Tr. 1294), Mr. Havemeyer did not take these facts into account in characterizing the A&P service. It is fair to assume that Mr. Sczcepaniak's testimony to the effect that all received the same service implies that there may have been some occasional extra services performed for A&P stores, as was done for some of the unfavored competitors.

In any event the slight variations noted above in connection with Burger's, Model, Tittle and Wallies were not enough to impress the Borden Assistant Route Foreman, so that he classified these customers differently. He noted that he had personally served all of these stores and was familiar with the terms of service for each (Sczcepaniak, Tr. 1281-1285). His description of the normal service, as noted above, indicated that the only difference between these customers and the A&P stores was the fact that the A&P stores pre-ordered (Sczcepaniak, Tr. 1286-1294) and this difference was minimized by his other testimony (Sczcepaniak, Tr. 1294). Moreover, he showed a very clear recollection of individual service requirements. This was emphasized by the fact that he was even familiar with the lay-out of, and special services required for, two other stores on the routes (Southtown and Dick's) which had long since been closed. (Sczcepaniak, Tr. 1289-1290). The other testimony above does not detract from or contradict his basic testimony.

Obviously this first-hand knowledge of Borden's customer service is far superior to Mr. Havemeyer's uneducated guess; noting again that Mr. Havemeyer had no personal observations or knowledge of Borden's Hammond delivery procedures. Accordingly, Mr. Havemeyer's characterizations of stores as "full service" or "limited service" are arbitrary and erroneous and have materially affected his calculations. 103/

103/ In this regard it should be noted that in the case of the one competitor credited as receiving "limited service," the delivery expense calculated for Wilco Food Center was lower than that computed for A&P stores. (RAPX 234, p. 9).

(iii) Failure to Make a Proper Classification of Customers: Again, as in RAPX 232 and 233, Mr. Havemeyer has failed to make any classification of customers, including A&P stores, according to type of store and volume of purchases. As in the case of those studies, which dealt principally with the O'Hare Branch, the record again discloses substantial differences between the various stores.

Mr. Sczcepaniak's testimony reveals that there are different types of stores on the Hammond routes (Sczcepaniak, Tr. 1289-1290). Mr. Havemeyer's own calculations show there are vast differences in store purchase volumes, as well. The purchase volumes of the unfavored competitors range from a low of 2.7 cases per delivery to a high of over 88 cases per delivery. (RAPX 234, pp. 19 and 49). The small customers who were not included in complaint counsel's price discrimination tabulations, had purchase volumes ranging from 2.71 cases per delivery to 16.4 cases per delivery (RAPX 234, p. 19). Those included in complaint counsel's tabulations range between 18.2 cases per delivery to highs of 67, 78 and 89 cases per delivery in the instances of Wilco Food Center, Burger's and Tittle Valparaiso (RAPX 234, pp. 19 and 49).

A&P stores also showed a broad range; although none go near as high as Wilco, Burger's or Tittle Valparaiso. They range from a low of only 17.61 cases per delivery to a high of 52.97, with a 13-store average of only 29.03 cases per delivery. (RAPX 234, pp. 15, 19).

Obviously these are very great differences in purchase volume. 104/ They also indicate that the stores are different sizes and different types. For instance the Burger store purchased far more than twice the amount from Borden than did the average size A&P store and almost 5 times the volume of the smallest A&P stores. Mr. Kristoff testified that the A&P stores that competed with him were not comparable in size with the Burger's store (Kristoff, Tr. 2270).

Yet, Mr. Havemeyer made no study of the possible different classes of customers. He has ignored this critical area of study despite the fact that Borden's discount schedules set up various volume brackets (See CX 138) and the record shows great disparities in size and type of store and purchase volumes.

This is the same error made by Mr. Havemeyer in his only previous cost study in a litigated Robinson-Patman case; the Bowman study (Tr. 7685, 9132). It is notable that in Mr. Havemeyer's own studies for state milk marketing agencies, that even he has given some recognition to the need to classify customers by type of store and volume purchased. (See RAPX 245A, Table 2; RAPX 245B, Tables 2A and B; and RAPX 245C, Tables 3A-G).

104/ The evidence shows that volume plays a very important part in costs. (Abrams, Tr. 6425-6427; Dr. Solverson, Tr. 1551-1552, 1554-1555).

Mr. Havemeyer's failure to classify the Borden customers, including A&P, by type and purchase volume is a fatal defect in this allocation; as well as in the allocation of other expense functions such as, product waste, branch selling, credit loss, and merchandising expense.

(iv) Commission Expenses Are Incorrectly Allocated On a Time Basis -- Cannot Give Rise to a Cost Justification: Again, Mr. Havemeyer has made the mistake of allocating routemen's commissions on the basis of the time the driver spent at the store (RAPX 185, pp. 122 and 125). This methodology is clearly contradicted by the record which shows that the commission is earned on a strict volume basis; on the amount of product delivered to a particular store, and not on the basis of the driver's time. (Sczcepaniak, Tr. 1293; Banaski, Tr. 9547, 9560, 9561; CX 298-300; RAPX 234, p. 82).

The fact that commissions bear no relationship to the routeman's time is clearly illustrated by Mr. Havemeyer's own tabulations on page 82 of RAPX 234 and by the underlying Borden records (RAPX 91 and 92). Mr. Shavey, one of the routemen, worked only a 4-day week earning a salary of $122.20, as compared to a 6-day week for Mr. Nowicki who earned a salary of $198.58 for the week. (RAPX 234, p. 82; and RAPX 92). However, the monthly commissions were something else.

Mr. Shavey here earned $1,180.79, as compared to Mr. Nowicki's $1,012.95. Both far outstripped a third routeman (Mr. Murphy) who worked a five-day week and earned only $794.09 in monthly commissions. (RAPX 234, p. 82; RAPX 92). Thus the commissions show no relationship to the working hours. This is supported by Mr. Sczcepaniak, who testified that commissions varied according to sales (Sczcepaniak, Tr. 1293). The union contracts also show this to be the case (CX 298H-J; CX 299H-K; CX 300H-J).

Over 45% of the labor expense being charged by Mr. Havemeyer to delivery represents "commission" expense. (See RAPX 234, p. 82). This commission expense has been falsely allocated on the basis of service time so as to give the illusion of a cost difference. In truth and in fact, this substantial sum (commissions) is related solely to volume and must be related equally to each unit delivered. It cannot, therefore, give rise to any cost difference as between competing purchasers. (Lemberg, Tr. 9405, 9434-9436, 9408). [See also, Finding 9(f)(vii), above, for a more detailed discussion of these same basic facts in connection with the "profitability study."]

(v) The Automotive and Building Expenses are Improperly Allocated On A Time Basis: Mr. Havemeyer has also allocated non-labor and automotive expenses on the basis of the time the driver spends at the individual stores (RAPX 234, pp. 84, 78; Tr. 8664-8665). The non-labor expense is principally building-related expenses (RAPX 234, p. 81-82, 84).

As noted in Finding 9(f)(viii) above, in connection with the "profitability study," automotive expense is not related to the time the driver spends at the store. The truck is used merely to bring the product to the store and should be equally allocated to each unit of product. (Lemberg, Tr. 9408-9409, 9447, 9451). This expense is incidental to the volume because it has to be hauled around the route (Lemberg, Tr. 9448-9449). Mr. Lemberg noted that the proper allocation of this item of expense to volume would "remove any cost difference in the allocation of the delivery expense" insofar as automotive expense is concerned. (Lemberg, Tr. 8409, 9447).

Similarly, Mr. Lemberg noted that building expense should not give rise to a cost difference. He noted that the building expense is in no way related to the time the deliveryman spends in the store. (Lemberg, Tr. 9412).

Quantitatively, these errors are quite substantial. Automotive expense has been calculated at $7,290.39. Non-labor costs are calculated to be $2,022.89. (RAPX 234, p. 82). When added to the labor expense, which Mr. Havemeyer used, $7,380.98, they give a total delivery expense of $16,694.26.

The automotive expense plus the non-labor expense represent about 56% of this expense. When the $3,354.99 in commissions is added to these two expense items, it is seen that about 76% of the delivery expense has been improperly allocated on a service-time basis.

The elimination of this very substantial portion of the delivery expense from the cost study would obviously have a very substantial effect. Of course, in the absence of any time study to show how the balance should be allocated, it is impossible to accurately assess the full extent of such change.

(vi) Service Difference Cannot Be Considered In Any Event: Only those cost differences which are due to the "differing methods or quantities" of sale or delivery are cognizable under Section 2(a) of the Robinson-Patman Act. Even if it were conceded, which it is not, that there were substantial differences in the methods and time requirements of delivery as between A&P and its competitors, the cost difference in this case is not due to differing methods, but to difference in availability. Borden offered to all other stores the same type service spelled out in the Borden-A&P contract. (Compare CX 62P-Q with CX 138). However, in contrast to the great savings afforded to A&P under the contract, only a 2% discount was offered to competitors. (CX 138).

Thus, "limited service" was not made available to competitors on the same basis on which it was given to A&P. The difference, if any, in service-time as between A&P and its competitors was not due to a "differing method" of delivery, but to the different terms under which this system was offered. The service terms are not separable from the pricing package, they are part and parcel of the discrimination.

For a more detailed discussion of these facts see Finding 15(b)(ii) above. As noted there, the alleged time difference, if such exists, cannot be taken into account in a Robinson-Patman cost justification study under these circumstances.

(vii) Mr. Havemeyer Improperly Averaged Data For A&P Stores: As noted in paragraph (iii) above, there is considerable difference in the characteristics of the various A&P stores in the Hammond study. They range in purchase volume from a low of 17.61 cases per day to a high of 52.97 cases per day. The 13-store average is only 29.03 cases per day. (RAPX 234, pp. 15, 19). The averaging out of the service costs over this wide range of purchase volumes necessarily works to the substantial benefit of the smaller sized A&P stores.

For instance, one of the A&P stores taking only 17 cases was store No. 325, located in Hammond and in competition with Burger's. (See RAPX 234, p. 19 and CX 182B). Burger's purchased better than 78 cases per delivery (RAPX 234, p. 19). If A&P store #325 were properly classified as to size of store and purchase volume, and the same type of classification were made as to Burger's, it is quite apparent that this disparity in purchase volumes would wreak substantial change in the allocation of delivery and other expense functions.

(viii) No Proof of Comparative Times of Service -- Allocation Impossible: Finally, as noted above, the allocation of delivery expense by Mr. Havemeyer was based solely on service time. However, Mr. Havemeyer has been unable to produce competent evidence as to the service time involved in the case of the Hammond customers. (See "Order Supplementing and Modifying Order of September 11, 1974 Re Mr. Havemeyer's Cost Justification Exhibits," dated September 16, 1974). As a consequence, Mr. Havemeyer has failed to produce evidence of any cost difference, as between A&P and its competitors, in connection with the physical delivery function.

(c) Branch Clerical Cost:

In this section Mr. Havemeyer allocates the office expense (RAPX 86, line 36) to customers on the basis of the delivery ticket, or number of deliveries. (RAPX 234, p. 78). He first determines the cost per total delivery ticket and then allocates the cost to A&P stores and each competitor on the basis of the percentage of the total ticket represented by the lines dealing with private label or private label equivalent items. (RAPX 234, p. 78). 105/

(i) Clerical Expense Is Not Solely Related to the Delivery: As pointed out in Finding 15(c)(i) above, branch clerical (office) costs do not relate solely to the delivery ticket. Even Mr. Havemeyer only claims that processing of the delivery ticket represents "one of the significant functions ... of Branch Clerical ...." (Tr. 7716). (Emphasis added). Mr. Lemberg has pointed out that branch clerical costs also involve a number of other significant functions, such as, inventory control, maintenance, operation of the vehicles, payroll and the selling function (Lemberg, Tr. 9414). He also pointed out that a number of these items bear far more directly on volume, than on the number of lines on a delivery ticket (Lemberg, Tr. 9415). As noted in a number of instances above, volume-related expenses cannot result in a cost difference, because they apply equally to each unit no matter where delivered. (Lemberg, Tr. 9408).

105/ Note that, contrary to RAPX 233, the O'Hare Study, Mr. Havemeyer does allocate clerical expense solely to the private label equivalent items in this study.

Under these circumstances, Mr. Havemeyer's allocation of branch clerical expense is defective, since it is not allocated in the manner in which the expense was incurred. (Lemberg, Tr. 9414-9415).

(ii) Methodology Shown Incorrect by Comparison With O'Hare Study: The incorrectness of Mr. Havemeyer's methodology is well illustrated by comparing his allocations in the O'Hare Study and the Hammond Study. In the O'Hare Study, Mr. Havemeyer arrives at the astounding figure of 73 cents expense for processing just one delivery ticket (RAPX 233, p. 11). Obviously, Borden did not spend this amount for the routine processing of one delivery ticket. However, this same methodology leads to an even more amazing result in Hammond. Here Mr. Havemeyer's methodology results in an expenditure of $3.38 for the processing of just one ticket. These results show clearly the error in ignoring the other significant functions performed by the clerical staff.

(iii) Methodology Shown Incorrect By Comparing With Dairy Broker Segments Of Hammond Business: Comparison with the clerical cost associated with the Dairy Broker segment of the Hammond Branch business also shows the error in Mr. Havemeyer's methodology. In the case of the dairy broker, the Hammond Branch office would have only one customer per route -- the independent distributor (broker). (Malone, DTr. 76-78; Daube, Tr. 6677). Yet the total amount of clerical expense is proportionally about equal to the clerical cost for the wholesale routes. (Compare RAPX 86 and 87, as well as the volume on RAPX 80 and 81.)

Obviously, the clerical expense on the vendor, or broker, routes is not going to be much involved with delivery tickets. The rest of the functions involved with the broker volume are, however, equally as pertinent to the regular wholesale business. They are, among others, building, inventory control, maintenance, storage and loading. If these expenses make up such a great amount in the case of the independent distributor (broker), they must also make up the greater part of the clerical expense in the case of the regular wholesale routes. Thus it would appear from a comparison of the per unit cost of clerical function, as between the dairy broker account and the regular milk account, that this expense is primarily related to volume.

(iv) Has Not Accepted Borden's Accounting Methods: Frequently when questioned concerning particular computations, Mr. Havemeyer's answer has been to the effect "... Borden's accounting system and, presumably, they know more about the charging of accounts expenditures than we do at this time, at this distance -- they charged a certain amount of money to these categories, and I have to assume they know where the money is spent". (Tr. 8653). Yet, he has ignored the methodology used by Borden in this instance.

Borden's records of expense for the various types of business in Hammond reveal that Borden charged the office expense to wholesale sales, dairy broker, trailer-runs and retail on a volume basis. (Compare RAPX 86 through 89, and also the volume figures in RAPX 80 through 82). For example, the trailer-runs which account for the biggest share of the volume out of Hammond (RAPX 82) account for the greatest portion of the office expense (RAPX 89). Since Mr. Havemeyer had made no study of how this expense was incurred, he should bow to Borden's expertise and allocate the total amount on a volume basis.

(v) Mr. Havemeyer Ignores Possible Extra Costs For A&P: Mr. Havemeyer admits that in the case of A&P there is a daily delivery ticket for each individual store and a summary billing sheet which combines the billings for a number of stores in one area (Tr. 8484, 8486). Necessarily then, there had to be extra processing of billings for A&P. First the individual store daily delivery ticket had to be processed. Then a number of daily slips had to be summarized into a weekly billing slip, by area. Moreover, Borden performed another additional billing service for A&P in that it included more information. It also had to include retail price information on a per unit, sub-total and total basis at A&P's request. (See "A&P's Further Amended Answer to Complaint Counsel's Request for Admission" dated March 12, 1973, page 2, second paragraph).

These facts were not considered or studied in Mr. Havemeyer's allocation of this expense to A&P stores. (Tr. 8478-8480, 8484-8486, 7716-7730). This failure constitutes error, where the record shows a substantial possibility of an extra cost for A&P in connection with the clerical expense. Without a study of this question and the proper allocation of any additional expenses to A&P, the study cannot arrive at a true cost difference. (Lemberg, Tr. 9421-9422).

(d) Product Waste:

The witness took the expense for waste from the Hammond wholesale delivery account (RAPX 86) and allocated it evenly to stores only, also excluding those stores which he designated as receiving "limited service" (A&P, Wilco and K-Mart). (RAPX 234, p. 78). He excluded the canteen routes and the "limited service" customers on the basis that product waste did not apply to them. (Tr. 8777-8787).

(i) Evidence Indicates That Product Waste Applied to All Stores -- It Included Leakers And Product Spoiling Within Date: Leakers and product spoiling within date could be returned by all customers, including A&P (See CX 62Q and CX 138). Mr. Havemeyer admits that leakers and product spoiling within date are "product waste" (Tr. 8490, 7749). However, he alleges that "someone in the accounting department" at Borden told them

(Case & Co.) that such products were handled separately in Borden's bookkeeping (Tr. 8785). He could not point to any evidence of record that this was the case, or identify the party who told him this (Tr. 8785-8786). This statement was allowed to remain in the record solely to show the basis of Mr. Havemeyer's opinion, but not in proof of Borden's accounting procedures. (Tr. 8786). 106/ No other evidence has been offered as to the treatment of leakers and product spoiling within date.

Therefore, Mr. Havemeyer's admission that such defective products are "product waste" and the further fact that he actually allocated some expense to A&P on the basis of such defective products in his one study, RAPX 232 (Tr. 7749, 7753), as well as Borden documents showing that leakers and product spoiling within date are returnable by A&P and limited service customers (CX 62Q; CX 138), are the only evidence of record concerning the proper accounting treatment of these products. They indicate that "product waste" expenses are allocable to all.

106/ On objection of complaint counsel to this unsupported testimony, the Judge ruled that the testimony would be allowed as the basis for Mr. Havemeyer's opinion, but that "We aren't going to accept the statement that someone unnamed told this witness a certain thing as a fact in this proceeding; only that such an event gives rise to this witness' opinion on the subject." (Tr. 8786).

(ii) *Only Record Evidence Indicates That Defective Product Was Substantial Part of Product Waste*: Competing retailers of any size generally testified that they had very few returns of spoiled product. Mr. Kristoff, of Burger's Food Market, stated that the occurrence of out-of-date merchandise was

> Very insignificant .... infrequent (Kristoff, Tr. 2431).

Mr. Minard, of the Tittle stores, testified that there was a:

> very small volume of out-of-date merchandise. *Sometimes there was damage, or a particular product that would go bad, but very rarely out-of-date*. (Minard, Tr. 3528). (Emphasis added). 107/

Mr. Barney of Model Food Center stated that the amount of out-of-date merchandise was "relatively small" (Barney, Tr. 3838) and Mr. Barnes, of Wallies Market, had no idea how much, if any, out-of-date product was returned (Barnes, Tr. 3909-3910).

Moreover, Mr. Havemeyer himself indicated that Borden probably experienced a high incidence of gallon paper leakers (Tr. 8101).

107/ Of course, the damaged and spoiled products within-date were returnable by everyone. It is particularly notable that the distinction between such products and product which was out-of-date had not been raised when any of the competitors testified. Thus this statement by Mr. Minard was completely voluntary and fortuitous. Had this been an issue of record at that time, each witness could have been questioned concerning the relative incidence of defective product, as compared to out-of-date product, within their returns. In view of Mr. Minard's testimony, it must be assumed that these other supermarket owners would have testified similarly.

Under these circumstances, the only evidence of record indicates that a substantial portion of "product waste" was represented by leakers and product spoiling within date, which were returnable by all. Accordingly, Mr. Havemeyer's exclusion of A&P stores, Wilco Food Center and K-Mart, constitutes substantial error.

(iii) Witness Has Not Studied Different Classes Of Stores In Connection With Product Waste: As noted in the previous paragraph, the record evidence shows very little product waste, insofar as the larger store customers of Borden are concerned. RAPX 36, the stipulation concerning service of other store customers in the Hammond area, shows that a few of the larger of these customers would testify in a similar manner (RAPX 36; compare volumes on RAPX 234, p. 19). The very small stores would not have so testified; thereby indicating a higher incidence of product waste (RAPX 36).

Despite these facts and his earlier misfortune with the Bowman study (Tr. 7685), Mr. Havemeyer persists in the untenable position that size and type of store and purchase volume do not require the additional classification of customers. If a proper study had been made, it is most likely that a great portion, if not all, of the "product waste" expense would have been allocable to the smaller classes of stores. Accordingly, Mr. Havemeyer's study of the product waste experiences of Borden is defective and deserving of no evidentiary weight.

(iv) Non-Store Customers Have Been Erroneously Excluded: Mr. Havemeyer bases his exclusion of the sales on the canteen and mixed routes solely on his opinion that there were "very little returns, if any, because a good route-man, especially when he is working in a plant such as we described before, the steel mill, if he sees a product isn't selling in a particular machine, he can take it over to another machine so you have very little return or product waste on canteen routes." (Tr. 8779).

First of all, this opinion is based on the observation of other canteen routes, not Borden's. (See Tr. 8779). Secondly, this observation is not really different from the comments of the large independent store operators cited in paragraph (ii) above. Mr. Havemeyer says "very little." The competing purchasers say, "very insignificant .... infrequent," "rarely out-of-date," and "relatively small." [See paragraph (ii), supra].

Thirdly, Mr. Havemeyer's characterizations of a good routeman's technique on a canteen route, should hold true of a good routeman on a wholesale route. Mr. Sczcepaniak noted that the drivers kept a "daily buildup" in their books on each customer (Tr. 1294). This would indicate that there were similar steps that were taken with store customers, especially those taking high volume who moved the product through their stores rapidly.

In short, Mr. Havemeyer has made no study of the actual facts. His assumptions would hold equally true for the large volume purchasers, who were obviously efficient and successful retailers. His exclusion of these substantial sales (RAPX 234, p. 78) without record basis is therefore erroneous.

(v) The Results Are Ridiculous In Light of Record Evidence And a Comparison With the O'Hare Study: Furthermore, the end results of Mr. Havemeyer's allocations are patently ridiculous. $.002575 is the amount which has been allocated per point to each of the unfavored competitors, except Wilco (RAPX 234, p. 78). In the case of Burger's this would total an enormous $137.78 for the month of October, 1969. ($.002575 times the monthly point volume 53,507.25 shown on RAPX 234, p. 19). This is flatly contradicted by the testimony of Mr. Kristoff cited above. (See Kristoff, Tr. 2431). In the case of the three Tittle stores on the Hammond routes in October, 1969, this would amount to over $146.00 for stores which "rarely" have out-of-date products (Minard, Tr. 3528).

The record evidence simply will not support such cost estimates. All of the errors cited above have obviously distorted Mr. Havemeyer's results to a very great degree.

Finally, it should be noted that the per point expense for the Hammond routes even greatly surpasses that which Mr. Havemeyer calculated in the O'Hare Study. In RAPX 233, the product waste cost was less than half that in RAPX 234, despite the fact that he was there dealing with a far greater number of customers, many more routes and on the average, much smaller customers. (See RAPX 233, pp. 21, 8 and 31). This just does not make sense. Certainly, if the Hammond Branch were that much more inefficient it would have been remedied long before this point. 108/

For all of these reasons, the results of Mr. Havemeyer's allocation of "product waste" must be considered deficient and erroneous. No cost difference has been demonstrated.

(e) Branch Selling Expense:

In this calculation Mr. Havemeyer took the Borden wholesale selling expense (RAPX 85) and added in certain expenses from the wholesale delivery account (RAPX 86). He then allocated this expense to non-A&P, store points only. He thus excluded A&P store sales and those to non-store customers from the allocation. (RAPX 243, p. 78; Tr. 8787-8798).

108/ Moreover the Municipal Code of Chicago reveals that there was an unusually short selling period within the City of Chicago. (RAPX 55) Section 154-16 of that Code requires that milk shall be sold not later than the day beginning 25 hours after the day of pasteurization, and such maximum time limit shall be designated on the label. (RAPX 55, page 6).

(i) Mr. Hevemeyer Did Not Consider The General Expense Of "Missionary Work" In His Allocation: Mr. Havemeyer's allocation is again based on the assumption that the entire time of the Borden salesman was spent in soliciting these particular store accounts (all non-A&P stores). (See Tr. 8494; RAPX 234, p. 78). The record shows that this is not the case.

As noted in Finding 15(e)(i), supra, the testimony of Messrs. Daube and Dischner, Borden executives, reveals that the basic function of the Borden saleman was to contact new customers and obtain new business (Daube, Tr. 9226, 9227; Dischner, Tr. 7161, lines 14-19). Therefore, it is clear that the saleman did not spend all of his time with the 17 independent store customers on the Hammond routes.

The most important function of obtaining new business (missionary work) is a general expense of doing business which benefits all of Borden's customers. As noted by Mr. Lemberg, such general expense should be borne equally by all customers and would not result in a cost differential. (Lemberg, Tr. 9419-9420).

Indeed, if any customer benefits more than others from the general expense of such missionary work, it is A&P. Increased sales is related directly to plant volume and, therefore, to economies of scale at the plant and other parts of Borden's operations. A&P was the only one of these customers on a cost-plus basis. (CX 62; CX 138; CX 288A-X; and CX 289A-C). Moreover, A&P told Borden that it expected Borden to keep its costs down by improving other economies (CX 106B, first two full paragraphs). With a brand new, highly efficient plant, economies of scale through increased volume is about the only way such economies can be made (CX 106B).

Accordingly, a substantial share of the branch selling expense should have been allocated to all sales including A&P store sales.

(ii) Non-Store Customers Have Been Erroneously Eliminated: Mr. Havemeyer bases his exclusion of all canteen sales on the opinion that such sales would be negotiated on a higher level than the Hammond Branch level (Tr. 8801-8802). He uses one example, Borden's dealings with ARA (allegedly a vending and catering service) as illustrating the basis of his opinion (Tr. 8801). His opinion is based soley on his experience with other dairy firms (Tr. 8802).

However, he cannot point to anything in the record which indicates this was the case with Borden and the Hammond canteen routes (Tr. 8802). He also admits that he has no personal knowledge of the dealings between these firms and Borden and that there is nothing in the record in this case to give him such personal knowledge (Tr. 8802).

We are left then with nothing but Mr. Havemeyer's experience elsewhere to support his position. This is the same experience which told him that Borden's wholesale route salesmen did not call on non-store customers served by wholesale routes. It is that experience which failed him miserably when Mr. Daube was called to support it on this latter position. As noted in Finding 15(e)(ii), above, at the very best Mr. Daube was unable to say whether such salesmen called on non-store accounts or not (Daube, Tr. 9246) and he actually tended to state that if the non-store customers were served by the wholesale routes then the wholesale route salesmen served them (Daube, Tr. 9226, 9234-9236).

Mr. Havemeyer's bald assertion that the Hammond salesmen had nothing to do with the canteen route accounts is, therefore, simply unsupported. He has no knowledge of Borden's actual practice (Tr. 8801-8802). The Borden company pay records lists the salesman (contact man) on the same record as that containing the supervisors and routemen for all wholesale routes (which term includes the canteen routes) (RAPX 92). The Borden expense records lump together all wholesale routes, whether they serve stores, or canteens, or both (RAPX 80-90). There is simply no record basis for the exclusion of these sales. Such exclusion, therefore, constitutes substantial error.

(iii) Record Does Not Support The Position That Salesmen Did not Call On A&P Stores: Furthermore, the record does not support the position that the Borden saleman did not call upon A&P stores. Mr. Havemeyer's positon is based upon the terms of the Borden-A&P agreement. However, that contract really provides that "Borden salesmen's services will be supplied at the store level only, to follow through on a complaint covering such matters as service, product or container." (Emphasis added). (CX 62Q).

Thus, Borden salesman were to call on A&P stores, but only to handle complaints. Yet Mr. Havemeyer has made no study of this function for A&P. He has instead eliminated A&P volume entirely from his calculations (RAPX 234, p. 78). This is not warranted based on the record evidence. The calculation is, therefore, erroneous.

(iv) Substantial Part Not Allocable To Larger Unfavored Competitors -- Provision For Bad Loans: Aside from the substantial portion of selling expense which must be considered a general business expense, as noted above, another very substantial portion of this selling expense is obviously not allocable to all classes of stores, especially the larger independents. That is the "provision for bad loans." (See RAPX 85, line 11).

A review of RAPX 85 (Borden account entitled "Selling Milk Wholesale") shows that the greatest portion of this account is made up of one entry "Provision - Bad Loans." Mr. Havemeyer admitted that this item had no bearing on normal credit or credit loss (Tr. 8791) and that it dealt with loans from Borden to a particular customer or customers (Tr. 8791, 8790). He also admitted that he made no study of this item to determine how it arose (Tr. 8790).

Yet the record shows that only one of the unfavored competitors relied upon by complaint counsel (and one of the smallest at that) had received a loan from Borden; that was Wallies Market. Further, the record shows that this loan was fully repaid, with interest. (Barnes, Tr. 3867). 109/

It is at least quite obvious that the rest of the unfavored competitors, Burger's, Tittle, Model and Wilco should not be saddled with an expense for a service they did not enjoy. Moreover, it is also clear that Wallies should not be charged with any of this expense without at the same time crediting it with the interest payments it was making to Borden.

Moreover, Mr. Havemeyer's failure to study the manner in which this expense was incurred, makes it virtually impossible to allocate. We do not know who had received

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109/ The Tittle chain did receive a loan from a bank, which Borden helped to arrange, but there is no evidence that Borden ran any risk on such loan (Minard, Tr. 3223-3224). A similar arrangement may have existed with Wilco Food Center (Gintert, Tr. 2468-2469), but it has not been established that this is actually the case, nor that if it is, that such loans occurred during the time period 1966-1970 (Gintert, Tr. 2468-2469, 2515-2516). In fact, A&P's cross-examination of this witness makes it appear that the loans, if any, occurred during an earlier period. (Gintert, Tr. 2512).

loans from Borden (Tr. 8790). We only know that none of the larger independent customers on the Hammond routes received such loans, with the exception of Wallies Market. 110/ We also know that some of this loan expense was transferred out to the "Delivery-Dairy Broker" account and apparently involves a loan or loans to dairy brokers (independent distributors). (Compare RAPX 85 with RAPX 87; also see Tr. 8812-8814). However, we do not know how much of the amount transferred out was made up of "Provision Bad Loans." Also, there is no record evidence as to whether or not A&P received any loans from the Borden company.

In short, we do not know anything about how this expense was incurred. We don't even know if it is a write-off of actual bad loans, or a reserve for the eventuality that a certain percentage of outstanding loans may be defaulted. (Tr. 3790).

110/ While Wallies is one of the larger markets when related to the other 10 customers on the Hammond routes, (which were not included in complaint counsel's case-in-chief), it is at the very lowest level of purchases when compared to the other six non-A&P stores on these routes. The latter six stores have purchases ranging up to 78.28 cases per delivery, as compared to Wallies' 18.75. (RAPX 234, p. 19).

Finally, Mr. Havemeyer has again failed to make any classification of customers. It is obvious from the record that all classes of customers did not receive loans from Borden. In fact, the record shows only one store which did -- Wallies. (See also Tr. 8790). This is hardly a basis for imputing such an expense to all independent stores. Moreover, as noted above, the record is totally silent as to whether A&P had received any loans from Borden in connection with its Hammond operations. There is, therefore, not as much of a basis for imputing this cost to Burger's, Model, Tittle and Wilco, as there is for allocating it to A&P.

In view of these facts, this very substantial portion of Borden's selling expense is clearly mis-allocated. On the basis of this record it cannot be allocated at all to Burger's, Model, Tittle and Wilco and there is insufficient record evidence to determine how much, if any, should be allocated to Wallies. Moreover, due to Mr. Havemeyer's failure to adequately study this expense, we cannot even tell what portion of the selling expense is involved (since we don't know how much of this particular item was transferred to the Dairy Broker account), but it could be as much as 75% or more of the entire account (See RAPX 85).

(v) Duplication Of Expense Items -- Expense Overstated: Mr. Havemeyer added $1,534.07 of expenses to this function from the delivery function without any record support. These expenses fall in four categories: traveling expense, membership fees and dues, contributions and donations, and miscellaneous expense. (Tr. 8794-8796). It is admitted that the same headings, with entries, also appear in the selling expense account (RAPX 85). (See Tr. 8794-8796, 8802-8809). So, despite the fact that Borden has already posted such expenditures to selling, Mr. Havemeyer has taken additional expenses, with the same titles, from the delivery expense account (RAPX 86) and posted them as selling expense. (RAPX 234, pp. 81 and 86; Tr. 8802-8809).

Mr. Havemeyer cited to no record evidence in support of this duplication of expense (transferring similar expenses from the delivery to the selling accounts). (Tr. 8794-8796, 8802-8809). In fact there is none. In the case of traveling expense and miscellaneous expense, he is obviously following his practice started in RAPX 232 and 233 of considering such items as the expense of salesmen. But at least in those cases the selling and delivery functions were included in one account (RAPX 71 and 72, Accounts 723-023). Here there are separate accounts for the two functions. Moreover, Mr. Daube from Borden, who was called to substantiate Mr. Havemeyer's postion as to the records at O'Hare indicated that, even there, the "traveling expense" included supervisional expense and the "miscellaneous expense" included a far greater range of expenses than the "petty cash" expenses referred to by Mr. Havemeyer. [Daube, Tr. 9216, 9211, 9182; Pergler, Tr. 5627-5629 -- for a more detailed discussion of this point and the citations see Findings 9(f)(iii) and 15(e)(vii), above].

Thus, Mr. Havemeyer's transfer of this amount, which constitutes about 26% of the total expenses being allocated here 111/, is erronerous and substantially overstates the amount of delivery expenses being allocated.

(vi) Mr. Havemeyer Has Not Studied The Sales Expense Of Borden's Chain Store Sales Manager And Assistant: Mr. Havemeyer admits that in allocating selling expense, he has made no study of the expense of Borden's chain store sales manager [Gordon Tarr until September 1968 (Tarr, Tr. 842)] and the saleman who assisted him in servicing the A&P account. His reason for making no such study was that his study dealt with 1969. (Tr. 8894). This is an obvious reference to the fact that Mr. Tarr retired in September 1968. (Tarr, Tr. 842). However, there is no record basis for holding that Borden's business relationship with A&P was altered one whit by Mr. Tarr's retirement.

111/ The total amount being allocated is $5,913.97 (RAPX 234, pp. 78 & 86). The amount of these expenses which have been improperly transferred to selling is $1,534.07 (RAPX 234, p. 81).

The record clearly shows that Borden had a chain store sale manager who spent almost all of his time serving the A&P account and that he had one assistant who helped him serve this account. (Tarr, Tr. 845-846, 897-899). A cost study which fails to take into account the effect of countervailing costs incurred for the favored customer alone is obviously defective. It cannot show a true cost difference. (Lemberg, Tr. 9422).

(vii) Mr. Havemeyer Has Not Adequately Studied The Selling Expense Account: A review of the selling expense account, comparing the expenses with the prior year and comparing it with other expense accounts and the salary records, reveals a need for a far greater study of this account than that made by Mr. Havemeyer. There are obvious discrepancies in several areas including supervisory expense, supplies expense and the question of selling expense for other sales out of Hammond.

In the case of supervisory expense RAPX 85 shows a supervisory expense of $1,866.33 for the month, with other wages totalling only $825.00. 112/ Obviously this supervisory

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112/ RAPX 92 reveals that there is one saleman or contact man serving the Hammond routes, with a weekly salary of $162.25. The slight additional monthly wage on RAPX 85 might represent some clerical help.

expense is way out of line, especially when it is noted on RAPX 86 that there is no supervisory expense for the current month in the delivery expense account. The same lack of supervisory expenses can be found in both the "delivery-dairy broker" account and the "Trailer run" delivery expense account. (RAPX 87 and 89). A scanning of the "same month last year," "this year to date" and "last year to date" columns on these four exhibits - RAPX 85, 86, 87, and 89 - reveals that supervisory expense appears to be shunted between the selling, delivery wholesale, and delivery dairy broker accounts (RAPX 85-87) and that no supervisory expense is allocated to trailer run sales during any of these periods.

Additionally, the questioning of Mr. Havemeyer as to this point revealed that there were other wholesale sales in the Hammond branch to which this and the other selling expense might have applied. (Tr. 8798-8800). Despite these serious questions Mr. Havemeyer made no deeper analysis of this account.

Again the item "Supplies" on RAPX 85 raises considerable question. Comparing it with the prior year's experiences there has been a drastic change. There is also a very huge increase over the average according to the year-to-date column. (RAPX 85). A review of the wholesale delivery and dairy broker accounts (RAPX 86 and 87) indicates that there may have been some shunting of expenses here as well, but Mr. Havemeyer has not made any study of this either.

Then there is the question of the existence of only one selling expense account. (Tr. 8809). The witness admitted that in the case of delivery expense, Borden's records break down its expense experience between several different categories including milk wholesale, dairy broker and trailer runs, as well as retail home delivery (Tr. 8809; RAPX 86-89). Yet only the one selling expense account exists for the Hammond branch (RAPX 85). Some of those expenses have been transferred to the dairy broker account, as noted above, but none have been accounted for in the other types of business. (See RAPX 88-89). In prior studies where an expense was entered in only one account, Mr. Havemeyer has made a proration of such expense over the other sales categories, but here he has apparently not even made any inquiry into the situtation. (See procedures followed for truck loading expense in Attachment 2 of RAPX 233, p. 10).

Moreover, Mr. Havemeyer admits that RAPX 75 shows a far larger volume of wholesale sales than that to which he applied the wholesale selling expense (Tr. 8809).

With all of these facts considered, it is clear that Mr. Havemeyer has not given adequate study to this account and to the manner in which this expense was incurred. (Lemberg, Tr. 9419-9420).

(viii) The Amount Allocated To Unfavored Competitors Is Obviously Too High:: The extent of the above listed errors is made all too clear by the ridiculous nature of Mr. Havemeyer's results. The witness has calculated a branch selling expense of 2.3035 cents for each point delivered to an independent store customer on the Hammond routes (and nothing to A&P). (RAPX 234, pp. 78, 3-9). Even by comparison with the O'Hare Study this seems greatly exaggerated (1.6036 cents - see RAPX 233, p. 23) and we have already illustrated the obvious exaggeration of this expense for the O'Hare customers. [See Finding 15(e)(iv), above.]

In the case of Burger's market the salesman visited on a monthly basis (Kristoff, Tr. 2378-2379). At Wallies Market the salesman called on the store once or twice each month (Barnes, Tr. 3933). Mr. Barney of Model Food Center testified that the Borden salesman generally called on him at his Dolton, Illinois office, rather than at the Hammond Store. He stated further, that such visits occurred on an average of once every six weeks. (Barney, Tr. 3836). Mr. Gintert of Wilco Food Center testified that the Borden salesman called on Wilco about once a week and spent a varied amount of time, generally about 15 minutes to a half-hour per visit (Gintert, Tr. 2524). Finally, Mr. Minard of the Tittle stores testified that to his knowledge the Borden salesman did not visit any of the Tittle stores. He called on him at the Tittle office, but he could not recall how often. (Minard, Tr. 3207-3208).

In the face of this record, Mr. Havemeyer has allocated the following amounts of money to these stores on a monthly basis: Burger's - $1,232.54; Wallies - $286.20; Model - $282.10; Wilco - $1,056.42; and the three Tittle stores combined - $1,307.67. (2.3035 cents times the monthly purchases units).

Thus, the one Burger store alone is allegedly using up over one-fifth of the entire selling expense, and a total of $1,232.54, by reason of a monthly visit by a saleman who earns only $162.25 per week. (RAPX 92). Even if he spent an entire week on the one visit, he couldn't come anywhere near this amount. Nor does the record reveal any other selling activity that could account for such a huge sum (Kristoff, Tr. 2319-2421, 2426-2436). As noted above, the salesman's activities with each of these stores reveals that the monthly expenditures are vastly overstated in each case.

(ix) Selling Expenses Not Incurred On A Volume Basis: The varied experiences of the customers listed in paragraph (viii) above show, moreover, that the selling expenditure was not incurred on a volume basis. The visits to these stores by the salesman varied from a weekly basis for Wilco to once every six weeks for Model. (Gintert, Tr. 2524; Kristoff, Tr. 2378-2379; Minard, Tr. 3207-3208; Barnes, Tr. 3933; Barney, Tr. 3836). In the case of Tittle, one visit to the main office took care of four stores. (Minard, Tr. 3207-3208). The only indication of the time spent on these visits was the testimony of the Wilco representative, who indicated that they took a varied amount of time, generally fifteen minutes to a half hour (Gintert, Tr. 2524).

Obviously this pattern shows no relationship to volume. The largest single store of this group, Burger's, was visited monthly. Wallies and Model which purchased similar volumes (RAPX 234, p. 19) were visited, respectively, once or twice a month and once every six weeks. Wilco, was called upon each week. (See citations above). Whatever the basis of such sales activity, it was not on the basis of the volume purchased by each of these customers.

As Mr. Lemberg pointed out, much of the selling expense must be equally appportioned to all customers, including A&P, as a general business expense (Lemberg, Tr. 9416-9419). [See Paragraph (i) above]. The remainder of the selling expense, that portion which can be properly charged to Borden's wholesale customers, should not, however, be apportioned on a volume basis because, as we can see from the above facts, that is not the way it is incurred. (Lemberg, Tr. 9419). Mr. Lemberg pointed out that the proper basis of allocating this remaining portion is on the basis of the saleman's time spent with the customers (Lemberg, Tr. 9420).

Of course, Mr. Havemeyer has made no study of this question. Accordingly, we cannot tell from this study how much should be allocated as a general business expense or the relative amount of the salesman's time spent with these several customers. Therefore, it is impossible to allocate the selling expense on the basis of this record. 113/

113/ We can tell, as noted in preceding paragraphs, that a substantial share of the expense, as stated, is allocated erroneously and that another substantial portion, that part which is a general business expense, can be discounted entirely, since it cannot give rise to any cost justification.

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(x) Methodology Contradicted By RAPX 232: Finally, Mr. Havemeyer's work in RAPX 232 contradicts his position in the Hammond study. Here in RAPX 234 he contends that selling expenses are not applicable to A&P. (RAPX 234, p. 78). Yet in RAPX 232 he did allocate some selling expense to A&P private label, though not nearly enough. [See Finding 9(g)(iv) above; and RAPX 232, p. 93]. This is another indication of error.

(f) Credit Loss:

In this allocation Mr. Havemeyer takes the amount of credit loss (Borden's Credit and collection Account -- RAPX 84), and apportions it to the various types of business (milk regular, distributior and trailer runs) in Hammond. He then takes the amount which he estimated was related to the wholesale business and allocates it equally per point among the 17 independent store purchasers on the Hammond wholesale routes. (RAPX 234, pp. 78 and 90).

(i) Apportionment To Wholesale Overstates Cost -- No Study Of Manner Incurred: In the first instance, there is obviously too much of this expense allocated to the wholesale business. The amount of credit and collection expense allocated to the "milk regular" account 114/ by Borden, included both

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114/ The credit and collection expense record is RAPX 84. However, this is broken down by Borden in other expense records between "milk regular," "milk distributors" and "trailer runs" (RAPX 80-82). The "milk regular" account includes both wholesale routes and retail home delivery routes (Tr. 8818-8819).

wholesale and retail home delivery sales. (Tr. 8818-8819). Mr. Havemeyer has allocated only 12% of this expense to retail home delivery customers and 88% to wholesale customers (Tr. 8818). This allocation between types of business is strictly a "judgment" allocation (Tr. 8821, 8819). It is allegedly based on the record and on Mr. Havemeyer's experience (Tr. 8819-8820). He admits that if done on a volume basis the retail sales would account for about 25% (Tr. 8819).

When his record basis was probed, Mr. Havemeyer referred to the Hammond distributor account (RAPX 81) and noted, at first, that such distributors (independent vendors) would be serving wholesale customers (Tr. 8820). 115/ He later had to admit that he didn't know what kind of customers such independent distributors served (Tr. 8820-8821). The evidence of record in this regard indicates that they serve both retail and wholesale customers (Malone, DTr. 78). Further, the evidence of record shows that such "distributors" are independent businessmen who buy the milk at Borden's dock and distribute to their own customers. (Daube, Tr. 6677; Malone, DTr. 78; Havemeyer, Tr. 8844, 8845-46). Therefore, the Borden expense here is not

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115/ The apparent logic being that these routes served wholesale customers and the "credit and collection" cost determined by Borden on this expense account would be indicative of Borden's own wholesale routes. The expense on RAPX 81 is shown as $.007 per point.

that of dealing with stores, or homes, or types of ultimate customer, but the expense of dealing with the distributor. Thus, it is in no way indicative of the credit and collection experience of Borden in dealing with store purchasers on its own routes.

Furthermore, Mr. Havemeyer admits that there were only 17 stores, other than A&P, on the Hammond wholesale routes (Tr. 8823) and that there were undoubtedly hundreds of customers on the retail routes. In addition, he admits that the "credit and collection" expense consists almost entirely of interest on overdue accounts and a provision for bad accounts (Tr. 8826-8828). He admits further that any bad accounts among the retail home delivery customers would be included in this amount (Tr. 8828, 8829). Further, an analysis of RAPX 84 and RAPX 80 shows that this account is strictly a "bad account" expense. 116/

Under these circumstances, Mr. Havemeyer's logic simply does not have any support. His dependency on the distributor account is misplaced, as seen above. On a per point delivered basis, his allocation is admittedly

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116/ It is also interesting to note that there is absolutely no provision for bad accounts for "milk regular" for the then current month of October 1969 (RAPX 84).

overstated (Tr. 8819). On a "number of customers" basis, his allocation is ridiculous. Obviously there is more chance for "bad accounts" among hundereds of retail customers than among 17 stores.

It is again obvious that Mr. Havemeyer, in a very slipshod manner, has failed to make the required study of how this cost was incurred. This is even more obvious in view of the additional errors pointed out below.

(ii) Credit and Collection Expense Not Representative: The credit and collection expense selected by Mr. Havemeyer is obviously not typical of the month of October 1969 and may not be typical of any particular month. Mr. Havemeyer has used RAPX 84 as his source for this expense. On a current month basis this account shows a total expenditure of $7,903.07, almost all of which is attributed to Borden's expense of dealing with milk distributors and trailer runs (RAPX 84; also see RAPX 81-82, the credit and collection entries for current month).

With this fact facing him, Mr. Havemeyer chose the year-to-date figure and apportioned it on a monthly basis, by dividing by 10 (RAPX 234, p. 90). However, he has made no study as to how this expense was incurred. It may have been on the basis of one month's bad experiences. It certainly is not typical of October 1969. (RAPX 84). Without further study as to how to these expenses were incurred, no allocation can be reliable.

(iii) Portion Due To Bad Credit Accounts Should Not be Allocated To All: As Mr. Havemeyer admits, this is a "bad account" expense record (Tr. 8826-8828; RAPX 234 p. 90). The manner in which the entries vary between year-to-date and current month on RAPX 84 and 80-82, as well as the substantial amounts attributed to "legal expense" and "interest overdue accounts," shows that it is, moreover, primarily related to particular customers who are in arrears in their payments. Yet Mr. Havemeyer has made a blanket allocation, per point, to all customers, in every size and purchase volume category, whether or not there is any showing that they are contributing to this expense.

In RAPX 221A-B, Mr. Havemeyer attempts to show that the larger unfavored competitors relied upon by complaint counsel were each "in arrears" in their payments to Borden in October 1969. If it shows anything, this exhibit shows that, with the exception of Wallies, all of these stores had been extended credit for a maximum of four weeks. 117/ Obviously

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117/ This is based on a comparison of the average weekly sales figure with the largest balance shown for each store. In the case of Wallies, the tabulations on RAPX 221 would indicate that it may have owed for about 8 weeks. In this regard, it should be noted that Wallies was one of the very smallest of this group of customers and that it was on the verge of terminating Borden as a supplier. (CX 200Z-4). In fact, it was the smallest single-store customer, since Model (the other small volume purchaser) was part of a two-store chain. (Barney, Tr. 3682). Moreover, there is nothing in the record to show that Borden considered this account in its "provision for bad accounts."

this is well within the range of normal credit. In support of this is the fact that those stores receiving rebates continued to be granted such rebates by Borden during this period (CX 288-289; CX 188, 191, 194-197, 200, 202). which clearly indicates Borden did not consider them to be in arrears.

In short, there is nothing in Mr. Havemeyer's tabulation that contradicts one iota the testimony of these various customers to the effect that they paid promptly and did not pose any credit problems for Borden, nor require any added expense of collection (Minard, Tr. 3157; Kristoff, Tr. 2285; Barnes, Tr. 3868; Barney, Tr. 3697).

Under these circumstances it is clear that Mr. Havemeyer has here allocated certain "bad account" expenses to customers, and classes of customers, who simply have not contributed to such expense. This fault is occasioned by Mr. Havemeyer's persistent refusal to recognize the fact that there may be different classifications of customers involved. This is admittedly the reason his Bowman study was rejected some years ago in another price discriminations case (Tr. 7685).

(iv) Exclusion of A&P Erroneous: If in fact there is any part of this expense account (RAPX 84) which is attributable to the extension of credit, then there can be no excuse for not allocating that portion to all credit customers, including A&P. Mr. Havemeyer admits that A&P

was a credit customer (Tr. 8791). In fact, the record makes it clear that A&P was Borden's biggest credit customer. (RAPX 232, p. 91).

But somehow he justifies in his own mind, but not on the record, eliminating A&P from this expense allocation. It may be A&P's huge size and tremendous yearly sales volume that leads Mr. Havemeyer to feel that A&P could not incur any credit expense for Borden's. (Complaint and Answer, Par. Two). However, a review of the financial data for some of the larger independents show they were as financially sound, if not more so, than A&P. (CX 189, 192, 199 and 203, *In Camera*; compare CX 216-221, portions of A&P's annual reports).

Again the record fails to support Mr. Havemeyer's assumptions. Therefore, his allocation is erroneous in this regard too.

(v) Ignores Borden Accounting Procedures; In the face of all these errors and unanswered questions, Mr. Havemeyer has ignored the Borden allocation procedures for this expense. Borden has allocated $.0006 per point to all wholesale points (including A&P's) for the month of October 1969 and $.0020 per point for all wholesale points for the year-to-date. (RAPX 234, p. 80). Either way this would not create a cost differential. In the absence of any other evidence, this is the only record evidence as to how this cost should be allocated.

(g) Advertising Expense:

In this allocation, Mr. Havemeyer has taken an expenditure of $826.00, which is primarily the expense of media advertising of four products (Swiss Style Yogurt, Thirstee Smash, Lite Line Milk and Dips) and allocated this expense to the points sold on the Hammond retail and wholesale routes, excluding canteen route sales and the Borden private label sales. (RAPX 234, p. 78; RAPX 90, p. 3).

(i) Bulk of the Expense Not Allocable In This Study: The expenditures involved in this allocation are primarily taken from page 3 of RAPX 90 which lists certain "media advertising" expenditures for Swiss Style Yogurt, Thirstee Smash, Lite Line Milk and Dips in the Chicago Rockford/South Bend areas. (RAPX 90). He has allocated a certain portion of this to the Hammond area on the basis of population. To this he has added 19% for alleged "production expense" related to such advertising (to be dealt with below) and $9.00 for Directory and Miscellaneous advertising. Thus, all but $9.00 of the sum being allocated involves the "media advertising" of the four products.

However, of the four products involved in this media advertising, only one, Dips, was involved in the Borden-A&P private label agreement (Bitting, Tr. 9334).

Two of the other three products were sold to A&P and competitors in the area, only under Borden label. They were not included in the private label contract and were not private label equivalent items. (Bitting, Tr. 9335). The fourth item, Thirstee Smash, was not sold to any of the store customers in this area (Bitting, Tr. 9335).

Thus, three out of the four items of "media advertising" have not been shown to have any bearing on the question of cost justification of Borden's price differences on private label and private label equivalent items. 118/ Moreover, the one item, Dips, represents only $3,410, out of a total expenditure for all four of $114,258 -- less than 3% of the total. (RAPX 234, p. 88).

118/ Mr. Havemeyer argues that these advertisements are really advertisements of the entire line of Borden products, not just the named product, and that therefore the expense is applicable to all Borden label products (Tr. 9638-9641). However, on cross examination it was revealed that each of the products involved appeared to be new products which were being introduced. (Tr. 9646-9655). Mr. Havemeyer admitted that he did not know what was said in any of the advertisements (Tr. 9655). He also admitted that he had encountered advertising campaigns directed toward increasing the sales of one product of a company's product line (Tr. 9768). It is apparent that this media advertising may have been solely directed toward the increasing of sales of these new products. In any event, it is clear that A&P has not carried its burden of proving this was not the case, as was noted by the Judge in his ruling on an objection to this line of testimony by Mr. Havemeyer. (Tr. 9640-9641).

If the expenditure for the Hammond area were computed on the basis of dips alone, it would give an expenditure for "media advertising" of only $20 (3% of $683). (RAPX 234, p. 88). Even with the addition of 19% production expense and the $9 expense for directory advertising, this would only give a total expenditure of about $33. If this were allocated by Mr. Havemeyer's methodology (which has further faults, as is noted below) it would yield a cost per point of only $.000056, a negligible figure. 119/ Consequently, Mr. Havemeyer's error in including the advertising expenditures for these other products constitutes substantial error.

(ii) Existence of Production Expense Not Proven: Further the existence of the "production expense" claimed by Mr. Havemeyer has not been proven. He admitted that there was no record evidence to substantiate this claim (Tr. 8861-8862). This estimate was based on his "experience" (Tr. 8861-8862). Mr. Daube was then recalled to testify in support of this position regarding the production expense. Mr Daube did testify that any such expense, if it existed, would not be included in RAPX 90 (Daube, Tr. 9190). However, his further testimony cast grave doubts as to whether any production

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119/ The amount computed by Mr. Havemeyer was $.001401, by comparison.

expense was ever incurred. (Daube, Tr. 9223-9224). Thus, once again Mr. Daube has failed to substantiate Mr. Havemeyer's "experience." Further, A&P has failed to carry its burden of proving the existence of this expense. It, therefore, cannot be allowed.

(iii) Institutional Advertising Would Apply To All Sales: Moreover, if Mr. Havemeyer were correct in his unsupported assumption that the "media advertising" represented institutional advertising (Tr. 9638-9641), then it would follow that the expense should be applied to all sales, including those of private label.

To this extent any advertising expense of Borden is a general expense of doing business; one intended to increase sales and, consequently, production. It would be akin to the "missionary work" of salesmen and should be equally apportioned to all sales. (Lemberg, Tr. 9419, 9420). This is equally true, if not more so, in the case of A&P and private label.

Size of the dairy supplier was extremely important to A&P. In seeking a private label supplier A&P only contacted the major dairies who were large enough to supply its needs. (Schmidt, Tr. 1734-1736). Also, the private label contract was a "cost-plus" contract (CX 62) and A&P expected Borden to keep down its cost by improving its economies (CX 106B). Economies of scale were the principal economies available to Borden (CX 106B). Advertising and selling efforts were the main means to that end. Therefore, to the extent advertising was institutional, a general business expense, it was equally, or more, applicable to A&P's private label purchase.

(iv) No Basis For Exclusion Of Non-Store Sales: Additionally, Mr. Havemeyer has, without evidential basis, excluded all non-store sales points as being unaffected by Borden advertising (RAPX 234, p. 78; Tr. 8862-8866). He admits that all of such sales are of Borden label, but claims that the dealings with canteen operators are primarily based on price. He argues that once the milk is in a machine the customer has little choice of brands. (Tr. 8864). He admits, however, that once a store owner selects the dairy brand for his store, a customer shopping there has little choice except to go to another store. But he argues in effect that this is easier for a store customer than for a canteen customer in a steel mill. (Tr. 8864-8865).

This ignores totally of course, the value of a recognized brand name in dealing with a store, or canteen customer. It may be true, as Mr. Havemeyer says, that business with canteen companies "is very much a price basis assuming adequate service ..." (Tr. 8864) (Emphasis added). But, if there is anything this record makes clear, it is that it is much the same case between the dairy and store customers also. This would indicate that the primary benefit of the brand name is in dealing with the customer, the store or canteen. There is no reason of record to believe that the Borden brand name and corporate image is of any less import in dealing with a canteen operator, than with a store operator. Even Mr. Havemeyer admits that "adequate service by the supplier" is important to the canteen operator (Tr. 8864). The assurance of a well-known brand name certainly includes that image.

In short, Mr. Havemeyer has not presented convincing proof that the canteen and non-store sales points should be excluded from this calculation.

(v) Exclusion Of Other Hammond Sales Erronerous: Then too, Mr. Havemeyer has limited his application of advertising costs to only the "Milk Regular Point"; those on the wholesale and retail routes out of Hammond. (RAPX 234, pp. 78, 88, 90). This represents a relatively small portion of all the milk sold through Hammond. RAPX 80 shows the "Milk Regular" (wholesale and retail routes) sales to total

959,354 points. The total milk sales through Hammond (excluding Warsaw and South Bend sales - see RAPX 234, p. 79) were 2,939,538 points. (RAPX 83). Mr. Havemeyer has not given any reason for the exclusion of the "trailer-run" and "milk distributor" points from this calculation. All were presumably Borden label and all were served out of Hammond. 120/ Thus, almost two million points have been excluded from this calculation without record basis. (Tr. 8662-8666).

(h) Merchandising Expense:

In this allocation, Mr. Havemeyer has taken two items of expense from the wholesale delivery account for Hammond (RAPX 86) and allocated them to all points delivered on the Hammond wholesale routes (including the canteen routes), excepting only the points sold to A&P stores. (RAPX 234, p. 78). The two expense items were "repairs - cabinets" and "rent-leased cab & comp." The amounts involved were $43.79 and $744.55, respectively. (RAPX 86; RAPX 234, p. 78).

120/ As will be noted below, Mr. Havemeyer does attempt to use the "milk distributor" points to ascribe a separate portion of the "media advertising" and other advertising expenditures to Porter County, Indiana (including Valparaiso). (RAPX 234, pp. 88, 90). However there is no showing that the distributors involved in RAPX 81 delivered into Porter County, since there is no identification of these vendors. Other vendors (probably including the one serving Valparaiso) were served out of Warsaw and South Bend (Daube, Tr. 9218-9219). Furthermore, the much larger sales volume of the "trailer-runs," all presumably Borden label, has been totally ignored. It totals 1,469,973 points.

(i) No Showing That Expenses Involved "Merchandising": Almost 95% of this expense item is made up of the entry in RAPX 86 entitled "Rent-Leased Cab & Comp." and showing the expenditure of $744.55. (RAPX 234, p. 81; RAPX 86). The witness was not able to identify this expense or refer to any record evidence that this was a merchandising expense (Tr. 8879). Indeed, there is no such record evidence. He was not able to show any evidence that this expenditure did not involve equipment at the Hammond branch building, or a truck cab and compressor, or other non-merchandising expenditure. (Tr. 8879).

In the case of the other entry "repairs-cabinets" there was no entry for the current month. The amount used was one-tenth of the year-to-date figure on RAPX 86 (Tr. 8878; RAPX 86). Again, there is no evidence as to whether this expenditure involved cabinets at the Hammond branch office or elsewhere (Tr. 8878-8880). Nor, if it does involve cabinets elsewhere, whether it applied to only one store or more, or canteen customers as opposed to store customers, or one class of customers as opposed to others, or an almost limitless list of conflicting possibilities (Tr. 8878-8880). 121/

121/ Note that store customers such as Burger's testified that they had received no equipment from Borden (Kristoff, Tr. 2280).

In short, Mr. Havemeyer has not identified any "merchandising expense." He has advanced an opinion, for which he has been unable to produce any underlying basis when cross-examined. Such opinion cannot be accorded any probative weight. This entire allocation must then be considered defective.

(ii) No Study Of Classes Of Customers: As noted many times above, Mr. Havemeyer persistently and stubbornly refuses to face the conclusive evidence in this record that there are different classes of customers. If there were a merchandising expense shown and if it involved the renting, or giving of cabinets and the servicing of cabinets, it could not involve all classes of customers. The record evidence as to this fact is clear and unopposed.

Mr. Kristoff testified that Burger's had received no equipment from Borden (Kristoff, Tr. 2280). Mr. Minard testified that none of the Tittle stores on the Hammond routes had received any equipment from Borden (Minard, Tr. 3209). Wallies Market had received no equipment from Borden in connection with its milk purchases (Barnes, Tr. 3867). Model Food Center did not receive any equipment from Borden in connection with its milk purchases (Barney, Tr. 3695-3696, 3743-3744). Only Wilco Food Center, out of all of these stores, had received equipment from Borden--valued at about $500.00 (Gintert, Tr. 2465).

This uncontradicted testimony reveals that such expenditures could not fairly be allocated across-the-board to each of these customers, as Mr. Havemeyer has done. His failure to study the manner in which these expenditures were incurred would impute expenses to customers and classes of customers who have not been responsible for them. This is a serious error, as has been frequently noted above in connection with other allocations.

(iii) Ridiculousness Of Results: Mr. Havemeyer's methodology would result in Burger's Market being charged with causing a monthly merchandising expenditure of $109.42 related to equipment and equipment repairs. 122/ In view of the uncontradicted testimony of the witness, such results are ridiculous.

122/ Obtained by multiplying the amount Mr. Havemeyer allocated per point (RAPX 234, p. 78) by the total monthly purchase volume in points (RAPX 234, p. 19).

Similar results can obviously be calculated for the other unfavored competitors named above. These results prove the error in Mr. Havemeyer's methodology.

(j) General Selling And Administrative Expense:

In this allocation the witness took the sum-total of expenses for advertising (including the media advertising discussed above) credit & collection, selling and delivery attributed to the "Milk Regular" account, and divided that into the sum of the Dist. Administration and Overhead expense. (RAPX 234, p. 89). Through this calculation he arrived at a percentage figure (5.33667%) which he then applied to the sub-total of all other expenses which he had allocated to A&P and each of the stores to arrive at a "General Selling and Administrative Expense." This, when added to the sub-total for the other expenses, gives the "Total Marketing Cost" which Mr. Havemeyer has computed for each. (RAPX 234, pp. 3-9).

(i) Overhead Expense Related To More Than These Several Branch Functions: As noted in Finding 15(h)(i) above (dealing with the same methodology in connection with the O'Hare study), it is obvious that Borden's Central Office expense is related to far more than just these branch functions to which Mr. Havemeyer is applying them.

Mr. Havemeyer's own calculations in RAPX 232 reveal that production and procurement, and transportation to branches, involves far greater expenses than do the branch operations. Since the Borden central office efforts are concerned with the totality of Borden's operations, they are obviously going to involve substantial effort as to these more expensive portions of its operations. (Tr. 9703).

Therefore, a very substantial portion of Borden's overhead expense should have been allocated in accordance with other functions of Borden's business, such as procurement of raw milk, production and transportation to branches. 123/ These functions are clearly related to volume; rather than service connected. The portion of overhead expense related to them would therefore be allocated on a volume basis (equally per point) and would not create a cost difference. It should, therefore, be excluded from the study.

(ii) The Expense Is Not Allocated On The Basis Incurred: Under Mr. Havemeyer's methodology, a very substantial amount of the overhead expense would be allocated on the basis of the time the driver spends at the individual

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123/ See Federal Register, December 14, 1972, Vol. 37, No. 241, Part II, pp. 26680-26686 - requires allocation of home office expense directly to segments of the business to which they are related. Any residual must then be allocated to all of the business activities of the home office.

store, since delivery expense is allocated on this basis. The percentage figure is, of course, applied to the delivery expense, as well as other branch functional expenses, to obtain the overhead cost. (RAPX 234, pp. 3-9). Yet it is obvious that the expense of the Chicago Central Office staff bears no relationship to the time the driver spends in servicing his customers.

Mr. Havemeyer admittedly has no personal knowledge of the functions and operations of the Chicago Central Office staff (Tr. 9701-9710, 9712-9714). No one from Borden was called to explain those functions and operations. Not even a minimum inquiry into those functions has been revealed on the part of Mr. Havemeyer or his staff. (Tr. 9701-9710, 9712-9714). This is another example of the faulty methodology employed by Mr. Havemeyer. 124/

(iii) Accuracy of Overhead Allocation Affected By All Errors Cited Above: Since Mr. Havemeyer is applying this percentage to the other expenses discussed above, even that portion which might be allocable to these functions would

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124/ See Federal Register, December 14, 1972, Vol. 37, No. 241, Part II, pages 26680-26686.

necessarily be substantially affected by the numerous errors cited above in connection with prior allocations. Each of these errors has a substantial impact on those other allocations and, therefore, also render the allocation of overhead expense erroneous.

(iv) Ridiculous Results: The fact that Mr. Havemeyer's methodology is erroneous is clearly revealed when the results are calculated out in the form of monthly dollar expenditures for the individual stores. Burger's Market would thus be charged with giving rise to a central office expenditure of $212.23 in October 1969 ($.003985 times 53,507.25 points -- See RAPX 234, pp. 3 and 19). 125/ Obviously there was not this great an effort directed toward this one account by Borden's central office. The record reveals no services or efforts on the part of the central office that could come anywhere near such an expenditure. Further, Mr. Havemeyer admits, as noted above, that he has no knowledge of the functions and operations of the Borden central office staff (Tr. 9701-9710, 9712-9714). The allocations are, therefore, without probative value.

125/ Similar computations for each of the other unfavored competitors would yield proportionally similar results.

21. Mr. Havemeyer's Allocations -- Valparaiso:

The study concerning the cost of serving the Tittle store and the A&P store in Valparaiso, Indiana was included in the Hammond study. However, it has a different record basis, in that the costs are primarily taken from a Borden record entitled "Hammond-Delivery-Dairy Broker" (RAPX 87) and a profit and loss record entitled "2 Milk Distributor" (RAPX 81), both of which deal with Borden's sales to independent distributors (also referred to as vendors and brokers) at Borden's Hammond dock. (RAPX 234, pp. 79, 87, 88, 91; Daube, Tr. 6677; Malone, DTr. 76-78). Also, the Valparaiso study compares costs between the Tittle and A&P stores on less functions, in that product waste and merchandising expenses were held to be inapplicable to both. Moreover, truck loading, physical delivery and branch clerical expenses were computed as being identical for both stores by Mr. Havemeyer. Therefore, the only differences arise from his calculations of four expense items: branch selling, credit and collection, advertising and overhead. (RAPX 234, p. 10).

22. Mr. Havemeyer Has Not Shown That RAPX 81 and 87 Apply To Valparaiso Sales:

Mr. Havemeyer's use of RAPX 81 and 87 as the source for cost data for his Valparaiso calculations is based on his contention that Mr. Marquardt (the independent distributor who delivered to Tittle and A&P in Valparaiso for Borden) picked up his milk at the Hammond dock and is included in the sales volume shown in RAPX 81. (Tr. 8626-8629). This contention is also based in part upon his analysis of another Borden record (RAPX 75) which is a summary of fluid milk sales in the Hammond Branch, including Warsaw and South Bend sales, for October 1969. RAPX 234, p. 79, is a reconciliation of that sales record (RAPX 75) with the records for the Hammond, Warsaw and South Bend sales records (RAPX 80-83 and RAPX 185, pp. 128 and 129).

However, his analysis on p. 79 of RAPX 234 does not account for all vendor (independent distributor) sales. That analysis shows a total of "vendor" sales in northwestern Indiana of 1,590,893 points. (RAPX 234, p. 79). But his analysis only accounts for less than one-third of these "vendor" points under the heading "Hammond Distributor" (RAPX 234, p. 79). This again reveals the shallowness and error involved in Mr. Havemeyer's analysis of Borden's records.

Borden's executive, Mr. Daube, was re-called to establish the fact that the Warsaw and South Bend sales belonged in this analysis on page 79 of RAPX 234. He did confirm the fact that the Warsaw and South Bend sales were a part of the total sales in RAPX 75 and that they were not a part of the other Hammond sales records - RAPX 80-83

(Daube, Tr. 9182-9183). HOwever, A&P did not ask him the most important question as to where the other million-plus points in vendor sales were accounted for. On cross-examination the faultiness of Mr. Havemeyer's analysis was clearly revealed when Mr. Daube testified that the Warsaw and South Bend records included "vendor" sales, as well as other categories of sales (Daube, Tr. 9218-9219). 126/ Thus, it becomes clear, when these records are compared to RAPX 75, that over two-thirds of Borden's vendor sales in Indiana -- 1,080,682 out of 1,590,893 -- were made through the Warsaw and South Bend branches (RAPX 234, p. 79).

Mr. Havemeyer's use of RAPX 81 and 87, as the sources of his cost data for Valparaiso, then squarely lies on his contention that Mr. Marquardt picked up his product at the Hammond dock. At one point Mr. Havemeyer asserted that he was "pretty sure" that this was the case, but did not "remember how I am sure of it .... I can't point to the document which will demonstrate that." (Tr. 8628-8629). He later admitted that the documentation does not substantiate his position (Tr. 8641), but alleged that the testimony, presumably of Mr. Marquardt, shows that this is the case (Tr. 8649-8650).

126/ Again Mr. Daube's "substantiating" testimony belies Mr. Havemeyer's methods.

However, Mr. Marquardt never testified as to where he picked up his milk. (Marquardt, Tr. 1315-1331). Furthermore, the only record evidence would associate Valparaiso more closely to South Bend than to Hammond. CX 17K lists the "vendor" serving Valparaiso under South Bend. CX 62I groups Valparaiso with South Bend and also quotes prices to stores in both of these places on the same basis. In short, if the record identifies Mr. Marquardt with any particular Borden dock, it is the one in South Bend.

Accordingly, Mr. Havemeyer has not carried his evidentiary burden of showing that the record basis for his calculations dealing with Valparaiso (RAPX 81 and 87) have any relationship whatsoever to the sales in Valparaiso. The records upon which he relies are apparently for entirely different vendors whose routes go "we know not where." His allocations are, therefore, without probative value.

23. Borden's Expenses With Vendors Not Attributable to Customers of Vendors:

Further, even if Mr. Havemeyer had selected the right expense records, the expenses thereon would be Borden's expenses of dealing with the vendors, not its expense experiences with individual stores served by the vendors. Mr. Havemeyer admits that the vendors were independent distributors (Tr. 8640). He further asserted that the vendor was "purely an outside -- I don't know what the correct legal term would be -- but a non-employee, anyway, operating his own vehicle." (Tr. 8762). (Emphasis added). Indeed, Mr. Malone described a vendor as "a distributor who purchases milk f.o.b. the dock and distributes it to whatever customer would be involved" (Malone, DTr. 78) and this is confirmed by the testimony of both Mr. Daube and Mr. Havemeyer himself (Daube, Tr. 6677; Havemeyer, Tr. 8640, 8762). Mr. Marquardt also noted that, other than those deliveries made for Borden, he bought the milk from Borden at the dock and sold to his own customers on his own terms (Marquardt, Tr. 1323). 127/

Certainly under these circumstances, Borden's accounting records dealing with sales to vendors show its expenses of dealing with these independent distributors, not of dealing with the distributor's customers. Borden had no relationship whatsoever with the customers of the vendors and, therefore, could not incur any expenses of dealing with them. (Malone, DTR. 78; Marquardt, Tr. 1323). Moreover, in the case of Mr. Marquardt, those several stores to which he only delivered for Borden, had a separate buyer-seller relationship with Borden, in which Mr. Marquardt played no

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127/ On the milk delivered for Borden he merely picked up and delivered the milk on a commission basis. (Marquardt, Tr. 1317-1318).

part. He had nothing to do with the pricing, billing or collection from these accounts. They were not a part of his own business. (Marquardt, Tr. 1317). Outside of the commissions paid to him for his deliveries to these few stores, Borden's expenses with Mr. Marquardt were those of dealing with him, not with his customers.

Under these circumstances, the record evidence all indicates that Borden's expense experiences with vendors were just that; the cost of doing business with vendors -- not with the customers of vendors. Accordingly, if Mr. Havemeyer was to apply these expenses to stores served by those vendors, he was under the burden of showing that all, or any particular part, of those expenses should be so applied. Nowhere in this record has he carried this burden. For this reason also, his allocations are totally without probative value.

24. Mr. Havemeyer's Valparaiso Allocations:

Mr. Havemeyer's methodology in these allocations is generally the same as that used in the Hammond and O'Hare studies, only based upon different records. Since there was no cost justification calculated in the case of loading expense, physical delivery or branch clerical cost, these items will not be covered in detail, although that does not mean there are no problems with them. 128/ In these cases also, Mr. Havemeyer has relied on the wrong records and applied the wrong costs. (See Findings 22 and 23, above). In the case of loading expense, certain discrepancies were pointed out on the record (Tr. 8643-8646, 8652-8655). In the case of physical delivery expense, it is important to note that Mr. Havemeyer eschews the methodology used in the O'Hare and Hammond studies and applies commissions on an equal basis per point, based on the fact, which he otherwise ignores, that the vendors were independent businessmen (Tr. 8761-8764). In the case of office expense he also changes his methodology and applies such expense on a straight per point basis (RAPX 234, p. 87), thus contradicting his methodology in the O'Hare and Hammond studies.

Again the purpose of Mr. Havemeyer's allocations is to rebut the record evidence educed by complaint counsel showing the price discriminations of Borden were not cost justified. As is noted in Findings 22 and 23 and the following paragraphs, he has failed in this regard.

(a) Branch Selling Expense:

This expense is taken from RAPX 87 ("Delivery-Dairy Broker) as noted above. As determined by Mr. Havemeyer

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128/ There were costs computed for these items, but Mr. Havemeyer arrived at identical costs for both A&P and Tittle.

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it consists of three items only: travel expense; miscellaneous expense (a negative figure); and transfer from other departments. (RAPX 234, p. 87). Over 95% of this expense as computed by Mr. Havemeyer is composed of the "transfer from other departments," which has been identified as being transferred from RAPX 85, an account entitled "Selling-Milk-Wholesale." The selling expense as calculated by Mr. Havemeyer is then allocated equally to all points delivered by the vendors, excluding the points sold to A&P Valparaiso.

(i) Some Errors of Hammond Study Also Committed Here: If these expenses were the expenses of dealing with the customers served by vendors, the allocations would still be subject to some of the same errors cited in relationship to the Hammond and O'Hare studies above. The "missionary work" of Borden salesmen in obtaining new "vendor" business would apply equally as well to all points including A&P. 129/ [See findings 20(e)(i) and 15(e)(i), above]. Further, the record does not substatiate Mr. Havemeyer's premise that the salesmen did not call on A&P stores. [See Finding 20(e)(iii) above]. Then too, Mr. Havemeyer has still failed to study the sales expense of Borden's chain store sales manager and assistant, who spent most of their

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129/ Mr. Malone had noted the increase in this portion of Borden's business (CX 90D) so there must have been some effort to expand these sales. (See also RAPX 233, p. 11).

time on the A&P account. [See Finding 20(e)(vi) above]. And the evidence shows that the selling sepense was not incurred on a volume basis. [See Finding 20(e)(ix) above].

In addition, there were other errors, or variations on some of the Hammond errors, in connection with the Valparaiso study, as is noted below.

(ii) Substantial Part Not Allocable to Tittle - Provision For Bad Loans: An analysis of RAPX 87, in conjunction with RAPX 85 (Selling-Milk-Wholesale account) shows that over 95% of the selling expense ascribed to the Valparaiso area by Mr. Havemeyer has been transferred to RAPX 87 from the selling account - RAPX 85. (See also Tr. 8812-8813 where this is admitted). Referring to RAPX 85, it can be seen that a substantial portion of the amount transferred to the "dairy broker" account necessarily consists of the entry "Provision-Bad Loans." Thus, a substantial part of the expense being allocated to Tittle here is made up of the "Provision-Bad Loans."

This is clearly erroneous. The Borden customers involved in the vendor account are the "vendors," not those to whom the vendors deliver. Thus, any provision for bad loans would deal with loans to the "vendors," not to stores. Obviously any "bad loans" made by Borden to its vendors are not attributable to the stores to whom those vendors deliver.

In the case of Tittle this fact is reinforced by the fact noted in Finding 20(e)(iv) above, that Tittle did not receive a loan from Borden (Minard, Tr. 3223-3224).

Again, Mr. Havemeyer has allocated an expense without analyzing how it was incurred, or to what classes of customers it applied. As usual, this failure has resulted in an erroneous allocation.

(iii) Rest of Selling Expense Also Not Shown to be Allocable: Further, an examination of the rest of the selling account (RAPX 85), from which most of the Valparaiso "selling expense" has been derived, shows that it is equally as inapplicable to the Tittle store. The next most substantial amount in this account is wages and wage-related expenses and supervision of the sales department, but Valparaiso is not on a Borden route. Any selling expense included in the dairy broker account would be simply that involved in dealing with the vendor. It cannot be ascribed to the Tittle store, which was not even a customer of the vendor which served it. (Marquardt, Tr. 1317). 130/

Two other entries entitled "supplies" and "transfers from other points" are not defined anywhere in the record, so that we have no way of knowing how they are incurred,

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130/ The record shows that the Borden salesman did not visit the Tittle store in Valparaiso. (Minard, Tr. 3207-3208).

but more importantly, they are small enough so that there is no way of telling whether or not any part of them is included in that amount transferred to the dairy broker account. (RAPX 85).

The only other entries, "membership fees" and "donations" would appear to be obviously inapplicable to an area outside the normal Borden route operations.

Therefore, the greatest part of the expenses reported in RAPX 85 are of a type not applicable to the Tittle Valparaiso store in any event. Further, to the extent they are transferred to the "dairy broker" expense account, the record would indicate they are the expense of dealing with the dairy broker, not the stores served by him.

(iv) Selected Current Month Figures Because Larger -- Followed Opposite Practice In Hammond: In each of the Borden records involved in the Hammond and Valparaiso calculations, there is an entry for the "current month" and one for "year to date" for each expense item. (RAPX 80-89). In the case of the Valparaiso selling expense calculation, Mr. Havemeyer has selected the "current month" entries, which are larger than the "year to date" entries in this instance. However, in the allocation of selling expense to the Hammond route customers he had used the "year to date" figures. He gave no reason for this switch in his method of allocating basically the same expenses. (Tr. 8813-8814); See also RAPX 85 and 87). Such contradictory procedures are also an indication of error.

(v) No Study of Manner Expenses Incurred: The review of the above discrepancies alone, shows an utter failure to make an adequate study of the selling expenses of Borden, as they may be applicable to certain vendors (who probably do not include the vendor we are concerned with in the first place). But, as noted in Finding 20(e)(vii) above, relating to the same underlying records as applied to Hammond, a review of Borden's expense records raises even further questions. There was certainly not enough study of these records.

Viewing these records in their entirety, and comparing "current month," "same month last year," "this year to date," and "last year to date" entries, reveals a number of discrepancies in several areas including supervisory expense, supplies expense and as to which sales are covered. (See RAPX 85). Such discrepancies are outlined in some detail in Finding 20(e)(vii) and will not be repeated here.

(vi) Mr. Havemeyer's Methodology Produces Ridiculous Results: The extent of all the above errors in methodology (including use of the wrong records, and the application of expenses of vendors to the vendor's customers) is readily apparent when we calculate out the amount of dollars of selling expense that is being attributed to Tittle Valparaiso in October 1969. According to Mr. Havemeyer this expense would come to $603.26 in selling expenses, attributed to a store which is not even visited by a Borden salesman. (Minard, Tr. 3207-3208). 131/ This is simply beyond the range of credibility. There is no evidence of record which could support such a monthly expense. The allocation is, therefore, obviously erroneous.

(vii) Methodology Also Contradicted By RAPX 232: Finally, Mr. Havemeyer's basic premise, that selling expenses are not applicable to A&P, is also contradicted by his own work. In RAPX 232 he did allocate some selling expense to A&P private label, though not nearly enough. [See Finding 9(g)(vi) above; and RAPX 232, p. 93].

131/ This figure is obtained by multiplying the two-week volume shown for this store on RAPX 234, p. 49, by 2.25 to get a monthly volume, and then multiplying this by the "selling expense" calculated by Mr. Havemeyer.

(b) Credit and Collection:

In this allocation, Mr. Havemeyer takes the credit and collection expense for the year-to-date from RAPX 81, the "milk distributor" expense record and applies one-tenth of that expense to the points sold to milk distributors at the Hammond dock, with the exception of 22,552 points which represent the A&P Valparaiso purchases for October 1969. With this one exception, the expense is allocated equally per point to the sales shown on that record. (RAPX 234, p. 90; RAPX 81).

The credit and collection expense as shown on RAPX 81 is, in turn, an apportionment of the credit and collection expense found on RAPX 84, a Borden record for the Hammond Branch for October 1969, entitled "Credit and Collection." Mr. Havemeyer has demonstrated on page 90 of RAPX 234, the manner in which this credit and collection expense has been apportioned to "milk regular," "milk distributor," "trailer runs" and "non-milk." (RAPX 84, 81; RAPX 234, p. 90). Thus the expenses which make up the "credit and collection" expense must be deemed to be those itemized in RAPX 84, the "credit and collection" account.

(i) Allocation On Same Basis as Hammond -- Many of Same Errors: The credit and collection expense has been allocated to Valparaiso customers in the same manner as the "credit loss" expense was allocated to the Hammond customers. Moreover, as noted above, the same types of expense from the very same basic record were being allocated in both instances. A number of the objections noted in Finding 20(f), above, also apply here and need not be repeated in detail. The atypicalness of the credit and collection expenses selected by Mr. Havemeyer, also constitutes a defect in the present allocation, as was noted in Finding 20(f)(ii) above. The allocation of "bad credit" expenses to all customers, without any study of customer classifications is also a substantial error, as is described in Finding 20(f)(iii) above. And the exclusion of Borden's biggest credit account, A&P, has not been justified by the record evidence, as is pointed out in Finding 20(f)(iv), above.

For all of these reasons, Mr. Havemeyer's allocation of this expense to Valparaiso area stores is unsubstantiated and erroneous. Of course, as noted above, the records used as the basis for this allocation have not even been shown to apply to the Valparaiso area. (See Finding 22, above).

(ii) Allocation of This Expense to Tittle Valparaiso Erroneous: Furthermore, there is no substantiation for the application of this "credit loss" expense (See RAPX 84 and Tr. 8826-8828) to the Tittle store. In the first place, such expense is the expense of doing business with the vendors, not the stores served by the vendors. (See Finding 23, above; also Tr. 8843-8849). Moreover, even if this were not the case the record clearly shows that the Tittle Valparaiso store is not responsible for any credit loss.

Mr. Havemeyer's own calculation in RAPX 221A shows that Tittle's largest balance was only the equivalent of about four week's credit. Mr. Minard of Title testified, without contradiction on the record, that Tittle paid its Borden bills promptly, did not pose any credit problems for Borden, and did not require any added expense of collection (Minard, Tr. 3157).

These facts, when viewed alongside the Borden credit and collection expense record (RAPX 84), clearly show that the allocation to the Tittle store was erroneous. On a monthly basis, the October 1969 entries in this account show that it was due almost solely to overdue accounts. There was no "provision for bad accounts" on the monthly basis, only those accrued in the past. The biggest identifiable amount was a provision for bad accounts with milk distributors, which could not be applicable to Tittle, since Tittle did not pay through a distributor (RAPX 84; Marquardt, Tr. 1317). The only other identifiable amount is interest on overdue accounts and the record shows that Tittle was never "overdue" (Minard, Tr. 3157).

Under these circumstances, this allocation is obviously erroneous.

(iii) Amount Allocated To Tittle Is Ridiculous: Furthermore, the calculation of the monthly dollar amount allocated to Tittle Valparaiso again shows the ridiculous nature of Mr. Havemeyer's allocation. If this allocation were accepted it would mean that an expense of $517.20 would be assessed against the Tittle Valparaiso store for "credit and collection" expense for the month of October 1969. 132/ This is simply beyond credulity in the case of a customer which paid its bills promptly, did not pose any credit problems and did not require any added expense of collection (Minard, Tr. 3157).

(c) Advertising Expense:

In this allocation Mr. Havemeyer uses the same "med[illegible] advertising" expenditures 133/ referred to in the Hammond allocation above [Finding 20(g)], apportions it

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132/ This amount is obtained by multiplying the two-week sales volume shown on p. 49 of RAPX 234 by 2.25 to obtain a monthly volume figure. This is in turn multiplied by the "credit and collection" expense per point of .008059 calculated by Mr. Havemeyer on p. 90 of RAPX 234.

133/ These expenditures were for the advertising of four specific products: Swiss Style Yogurt, Thirstee Smash, Lite Line Milk and Dips. (RAPX 90, p. 3).

to Porter County, Indiana on the basis of population, adds $135.00 taken from RAPX 81 (the "Milk Distributor" expense account) and apportions the sum of these amounts equally on a per unit basis to all of the sales points shown on RAPX 81, excluding the A&P private label volume, during October 1969.

Of course, it is not even shown on the record that any of the points sold to the distributors as evidenced by RAPX 81 went into Porter County, or Valparaiso. (See Finding 22, above). We simply don't know how much Borden-processed milk was sold in Porter County. Mr. Havemeyer has not accounted for most of the milk sold by Borden to or through vendors. (See Finding 22).

(i) Most of Hammond Allocation Errors Affect This Allocation Also: With the exception of the use of a $135.00 expenditure taken from RAPX 81, the allocation of advertising expense in Valparaiso is the same as that made in Hammond; the same methodology was used. Accordingly, most of the errors cited in connection with the Hammond allocations in Finding 20(g) above, also constitute errors in this allocation. Thus, it should be noted that the vast bulk of the expenses being allocated relate to products which are not covered by the Borden-A&P contract and are not included in the discriminations. This major portion of the expense, therefore, has no place in this cost study.

[See Finding 20(g)(i), above]. Next, the inclusion of a 19% production expense is not supported by the record evidence. [See Finding 20(g)(ii), above]. Further, institutional advertising, to the extent it is involved in the listed expenses, should apply equally to all points, including A&P private label, as is pointed out in Finding 20(g)(iii), above.

(ii) Use of $135.00 Expense Unsubstantiated -- Admittedly Defective: Mr. Havemeyer has taken the sum of $135.00 which he has included in this allocation from RAPX 81, from the year-to-date section, on an expense line entitled "advertising." It is approximately one-tenth of the "year to date" figure. (Tr. 8868). An examination of RAPX 81 reveals first that this figure is not representative of the month of October 1969. In fact, it can not be determined from this exhibit that such expenditure is typical of any month. It may have been one individual, atypical month's expense. (RAPX 81).

The expenditure recorded on line 32 of RAPX 81, which is used in this allocation, is the result of apportioning "year-to-date" figures on RAPX 90, an account entitled "Advertising Milk," to the "Milk Regular" and "Milk Distributor" accounts (See RAPX 90 and RAPX 80 and 81). Mr. Havemeyer admitted that most of these expenses were ignored in his Hammond allocations because "I could not identify it andI did not use it." (Tr. 8872) (Emphasis added). Outside of the directory advertising listed on RAPX 90 he had no knowledge as to what these expenses represented. (Tr. 8873). Although this caused even Mr. Havemeyer to exclude such expenses from his Hammond allocations, it did not deter his use of them here in Valparaiso. Obviously, this is an admission that inadequate study was made of this expenditure and how it was incurred.

Therefore, it is equally obvious that there is no way on the record to determine that the Tittle Valparaiso store sales were in any way affected by, or responsible for, this expenditure. Accordingly, it cannot be included in the allocation.

(d) General Overhead and Dist. Administrative Expense:

In this allocation Mr. Havemeyer used the same methodology as that used in the Hammond allocations, with the exception that he used RAPX 81, the Hammond "distributor" account as his basis, instead of RAPX 80 (the Hammond "milk regular" account). (See RAPX 234, p. 91; compare to p. 89, same exhibit). He also arrived at a result almost twice as high as the Hammond allocations. The percentage figure result was then applied to the sum total of the expenses allocated to the Tittle and A&P stores, respectively, to arrive at the "General O.H. & Dist. Administrative Expense" for these stores.

(i) The Same Errors Made Here As In Hammond Allocations: As in the case of the other allocations mentioned above, Mr. Havemeyer's errors and faulty methodology has carried over from the Hammond allocations to this allocation. First, it is clear that the overhead expense of Borden's central office relates to far more than just these few branch expenses, which in the case of Valparaiso are even fewer in number than those used in Hammond or O'Hare (compare p. 10 of RAPX 234, with pp. 3-9). As pointed out in Finding 20(j)(i) above, a very substantial portion of the overhead expenses should have been allocated in accordance with other functions of Borden's business, such as procurement of raw milk, production and transportation to branches. This would have removed such portions from this study, since they could not give rise to a cost justification. [See Finding 20(j)(i) above]. Then, the expense is again not allocated in the manner in which it was incurred, since the driver time has nothing to do with the incurrence of central office expenditures, as noted in Finding 20(j)(ii), above. Finally, this allocation is obviously made erroneous by the many errors existing in the other allocations to Valparaiso customers. [See Finding 20(j)(iii) above]. Therefore, this allocation is also without probative weight.

(ii) Lack of Probative Value Well Illustrated By Results: Again, the most dramatic proof of error here is to calculate out the amount of overhead (central office) expense being attributed to the Tittle Valparaiso store on a monthly dollar basis. Mr. Havemeyer's methodology would result in an allocation of $253.69 in monthly central office expense 134/ in connection with this one store account -- which was not even a separate account, but a part of a 4-store chain. [Of course, the other three Tittle stores were separately charged with incurring additional overhead expenses. (RAPX 234, pp. 5-7].

Obviously there was not this great an effort directed toward this store by Borden's central office. The record reveals no services or efforts on the part of the central office staff that could come anywhere near such an outlay. Of course, Mr. Havemeyer admits he has no knowledge of the functions and operations of the central office staff (Tr. 9701-9710, 9712-9714). Under these circumstances, Mr. Havemeyer's allocation is clearly without any probative value.

134/ Computed by multiplying the monthly purchase volume by the amount allocated to this store on p. 10 of RAPX 234.

25. Mr. Havemeyer Did Not Study Special Costs Incurred For A&P Alone In Hammond and Valparaiso Studies:

The record shows that certain expenses were incurred for A&P which were not incurred by Borden for other customers. Mr. Havemeyer should have studied these cost areas (Lemberg, Tr. 9421-9422) but he did not. Accordingly, his study is defective. Some of those cost areas are as follows:

(a) Mr. Havemeyer Did Not Study the Cost of the Chain Store Sales Manager and His Assistant:

The principal duty of Borden's chain store sales manager was to service the A&P account (Tarr, Tr. 845-846, 897-899). There was also at least one other sales representative who was similarly engaged with the A&P account, after the private label contract began (Tarr, Tr. 898-899). Yet, Mr. Havemeyer admittedly did not make any special study of this expense (Tr. 8894, 8550-8551). He argues that since this study was for October 1969, no such study was needed (Tr. 8894). This is presumably since Gordon Tarr retired from the position of chain store sales manager in September 1968 (Tarr, Tr. 842). However, there is no record basis for holding that Borden's business relationship with A&P was altered by Mr. Tarr's retirement. It must be presumed that his position was re-filled.

The record clearly shows that Borden's chain store sales manager spent almost all of his time servicing the A&P account and that he had one assistant who helped him in this endeavor (Tarr, Tr. 845-846, 897-899).

Mr. Havemeyer also argues that any such expense is included in his allocation of overhead (central office) expense, since he presumes it is within the central office expense which he has allocated (Tr. 8589-8590). He argues further that if Mr. Tarr and others spent a disproportionate amount of time on the A&P account, that there were others in Borden's central office who spent all or most of their time on non-A&P accounts. However, this is pure, unsupported supposition. He knows nothing of the operations of Borden's central office and cannot substantiate this theory. On this illusory basis he argues that his allocation of all central office expense as a percentage of other branch costs allocated to individual stores, properly accounts for the expenses of Tarr and others who spent disproportionate amounts of time on the A&P account. (Tr. 9701-9710, 9712-9714).

The record facts are these: the chain store sales manager and at least one other sales representative spent the vast majority of their time servicing the A&P account (Tarr, Tr. 845-846, 897-899) and there is no showing in the record of corresponding central office efforts for others

(Tr. 9701-9710, 9712-9714). If there were any indication that extra expenses existed in serving the A&P account it was necessary that they be studied. (Lemberg, Tr. 9421-9422). There is even more than an indication in this instance and yet Mr. Havemeyer did not make any such study. His analysis of Borden's cost of serving A&P, as compared to its cost of serving others, is therefore deficient.

(b) Mr. Havemeyer Did Not Study The Time Devoted To The A&P Account By Other Borden Executives:

Moreover, the record shows that other Borden executives, such as Messrs. Malone, Gose, Minkler, their successors and others, spent considerable time on continuing negotiations with A&P over the provisions of the A&P contract. [See Finding 9(j)(ii), above]. This A&P business represented a very substantial portion of Borden's Chicago area sales volume (RAPX 232, p. 91) and the continued dealing over the provisions of this important contract required a disproportionate amount of the time of a number of Borden top executives (Minkler, Tr. 125-279; Tarr, Tr. 849-889; Gose, Tr. 1045-1063; Malone DTr. 29-204; CX 79-81, 84-90, 102A-C, 105-106, 108, 110A-D, 303A-H). Even some of Borden's corporate office personnel in New York personally concerned themselves with the A&P dealings (CX 292).

Again, Mr. Havemeyer has made no study of these expenses. By the same logic as that noted in paragraph (a) above, this makes Mr. Havemeyer's study defective.

(c) Extra Expenses Incurred For A&P In Loading Valparaiso Store Purchases:

Since no cost difference was found for loading expenses for the Valparaiso stores, no discussion was had above concerning the facts surrounding this allocation. However, at least one important error exists. Possible extra costs in loading A&P products for the Valparaiso A&P store were not studied. In Findings 15(a)(viii) and 20(a)(iv) above, it is pointed out that extra handling was required at the loading dock for A&P's purchases. (Pergler, Tr. 5697-5698, 5700, 5702-5704, 5707).

This would be even more necessary in the case of the Valparaiso A&P store, since it would represent the only A&P sales loaded onto Mr. Marquardt's truck (Marquardt, Tr. 1317-1318). This would, of necessity require mixing of cases and pallets. 135/ A review of the two weeks purchases by this A&P store, as shown by Mr. Havemeyer's recapitulation of invoices for the two weeks ended 10/18/69 (RAPX 234, p. 47)

135/ There are 30 cases per pallet. (Pergler, Tr. 5632-5633).

reveals that very few of the purchases of private label product come out to even case lots and none come out to even pallet lots. This is even more apparent when these purchases are considered on an average daily basis, rather than on a weekly basis. (RAPX 234, p. 47; RAPX 78 which gives the units per case).

Therefore, it is without question that the loading of private label product for this A&P store required special handling at the loading dock. But Mr. Havemeyer has made no study of this effort. Therefore, his cost study cannot reveal the true cost difference. (Lemberg, Tr. 9421-9422). He has found the A&P and Tittle stores to have the same loading cost, when in fact the evidence shows the A&P store to have incurred additional costs which have not been studied.

(d) Mr. Havemeyer Did Not Consider Extra Costs Of Production and Handling Incurred For A&P:

Early in the negotiations Borden was quite concerned with the possibility of cost problems with private label, if the A&P private label contract should expand beyond the six main items then under consideration. It was pointed out that these six items represented about 70% of A&P's total volume. It was noted that further expansion of the product line might cause problems in "plant efficiencies" and in "distribution material handling." In connection with handling, it was feared that expansion of the number of items would seriously hamper the palletization process. (CX 7A-B; See also CX 14E).

The private label program was expanded to 11 products by the inception of the contract and even further, to at least 16 items, at a later date. (CX 62C; CX 197-Z-2). No study was ever made by Mr. Havemeyer to determine whether any additional processing and handling costs were incurred, as Borden feared (Tr. 7515-7517, 7525-7526). Mr. Havemeyer insisted that he knew of nothing which would cause such extra costs (Tr. 7525-7526, 9718-9720). In the case of distribution handling, he thought that if there were extra costs they would be miniscule (Tr. 7517).

However, the problem was real enough to trouble the true experts; the Borden Management familiar with their day-to-day operations. (CX 7A-B). Mr. Havemeyer's own lack of knowledge of Borden's actual operations is well established in the above findings. The failure to consider these probable additional costs is a serious deficiency in Mr. Havemeyer's study. (Lemberg, Tr. 9420, 9422).

26. Mr. Havemeyer Has Not Shown Costs Selected To Be Typical -- Actually Showed Some to Be Atypical:

In the records underlying the Hammond and Valparaiso studies, entries were generally made on a current month (October 1969) basis, a year-to-date basis, and, frequently, on a "this month last year" and "last year to date" basis. (RAPX 75, 80-90). Mr. Havemeyer has in each case selected the current month or year-to-date expenditure. (RAPX 234, pp. 80-81, 86, 87, 90-91). 136/ In some instances he has given no reasons for his selection. In others his reasons clearly indicate that there are substantial fluctuations in Borden's cost experiences (Tr. 8717-8726, 8765-8766, 8787-8797, 8815-8818), thus revealing the atypicalness of many entries.

In the preceding findings a number of apparently atypical expense experiences have been pointed out. For example, in connection with selling expenses, discrepancies in a number of the entries such as supervisory expense, supplies, and sales data to which they should be applied were pointed out in Finding 20(e)(vii), above. A great disparity also exists in the provision for bad accounts and other credit and collection expenses when compared on a monthly and year-

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136/ When using the year-to-date figure he divides by 10 to get a "monthly" figure.

to-date basis, as in pointed out in Finding 20(f)(i) and (ii), above. Disparities between monthly and year-to-date expenses under the category of selling expenses, as well as Mr. Havemeyer's contradictory use of each set of figures in different studies, is discussed in Finding 24(a)(iv) above. Also, discrepancies between the current month and year-to-date-entries in the advertising expense record are pointed out in Finding 24(c)(ii) above.

An examination of the Borden records shows many similar variations in entries which require study not made by Mr. Havemeyer. RAPX 86 shows unexplained variations in platform and loading expenses in comparing entries for the prior year. The year-to-date entry for this item for the prior year shows almost twice the expenditure as in the current year, thus indicating a possible switch in some expenditures away from the loading function. At the same time the "same month last year" column reveals no expense for this function. RAPX 86 also shows no supervision for the wholesale delivery account for October 1969, whereas the other columns show vastly differing amounts, on an average monthly basis. This same record also raises questions concerning entries under other headings such as "supplies", and "transfer from hauling account."

RAPX 85, the selling expense record for milk wholesale, shows a drastic change in the expense experiences of Borden in connection with "bad loans." It also shows major discrepancies in the entries for "suppliers". The entries for "supervision" and "wages miscellaneous" show disparities which raise serious question as to whose wages are included in this account.

RAPX 87 entitled "delivery dairy broker" contains disparities between its various entries for "supervision", "platform and load", "supplies" and "office expenses", among others.

RAPX 80 shows an unusually high advertising cost for "this year to date", when compared to the other advertising entries thereon. (It was this year-to-date expense which was utilized by Mr. Havemeyer in his calculations on p. 89 of RAPX 234). This exhibit also shows a great disparity between October 1969 and year-to-date experiences under credit and collection expense.

None of these disparities have been studied. They may be due to changes in the Hammond operations, as was claimed by Mr. Havemeyer in connection with the selection of the monthly figure for "Rent, Land and Buildings" under delivery expense. There he noted an "understanding that the Hammond Branch was being reduced in facilities at this time . . . ." (Tr. 8723). They may also be due to bookkeeping transfer of certain common expenses from one account to another, as may have been done in the case of supervisory expenses. (Compare RAPX 85 through 88). Then, they may just be due to atypical experiences during one or more months, which throw off the "current month" or "year-to-date" entries, or both.

A close examination of all of these accounts (RAPX 75, 80-90) will reveal other disparities between the entries under the various columns, which have not been studied by Mr. Havemeyer.

An adequate study of Borden's records would have revealed the answers to these questions. However, in view of the record evidence available, it would seem that the only finding that can be made in connection with most of these disparities in the expense records, is that frequently the entries for the month of October 1969 are not typical of the "year-to-date" experiences and _vice versa_. This fact is important in the determination of the time period to which this study applies, if any, as will be more fully discussed below. It is also important to the question of the typicalness of the cost experiences upon which Mr. Havemeyer has based his study. As noted in connection with the other studies above, this failure to determine the typicalness of expense data violates the very obvious rule laid down by Mr. Havemeyer himself under the Wisconsin dairy regulations. (Tr. 9134-9136).

27. Mr. Havemeyer's Inability to Give Basis For His Opinions:

It was noted in Findings 9(l) and 15(n) above, in connection with the other studies (RAPX 232 and 233), that Mr. Havemeyer was frequently unable to substantiate his opinions and assumptions. This same criticism is true of RAPX 234, as well, as is illustrated by the following examples. At Tr. 8620, he did not know the details of depreciation accounts to which he had expressed himself and admitted he had never personally inspected the Hammond operations. At Tr. 8629 and 8649, he was unable to cite the evidence which he claimed showed that Mr. Marquardt (the vendor who delivered in Valparaiso) picked up his milk at the Hammond dock. At Tr. 8641, he was unable to identify the volume taken by Mr. Marquardt. At Tr. 8790, the witness was not able to answer as to whether Borden had loans outstanding to any of the 17 store customers on the Hammond routes as of October 1969. At Tr. 8825 Mr. Havemeyer admitted that he did not know how the credit expense was assigned by Borden. At. Tr. 8879 he was not able to explain the nature of the major portion of the expenditures he was assigning as "merchandising expense." And at Tr. 8862, he was not able to produce any data to support his "judgment" concerning the application of a 19% production expense to Borden's "media advertising."

As noted previously, an expert must be able to give the basis for his opinions, assumptions or judgments, when called upon to do so. His inability to do so destroys the probative value of his work.

28. Failure to Classify Customers

As is noted in a number of findings above, Mr. Havemeyer has consistently refused to make any classification of customers by size, type and other distinguishing factors, despite clear and decisive evidence revealing that there are substantial differences. The only differentiation he has made is on the basis of whether they were "limited service" or "full service" customers and the evidence contradicts his findings even there. [See Finding 20(b)(ii) above].

The record reveals that the different sizes and types of stores differ in their enjoyment of a number of the functional elements included in Mr. Havemeyer's cost study. In physical delivery, branch clerical, product waste, branch selling, credit and collection, merchandising, and overhead costs, these differences are quite substantial. [See Findings 20(b)(ii) and (iii), 20(c)(v), 20(d)(iii), 20(e)(iv) and (ix), 20(f)(iii), 20(h)(ii) and 20(j)(iii), above]. Not only are services varied in their application as between stores, volumes and sizes of the store vary widely, even as between

A&P stores. [See Finding 20(b)(iii)]. The discount schedules of Borden, as well as its internal documents, show that various volume brackets were considered as having different cost experiences. (See for example, CX 138 and RAPX 74). Mr. Havemeyer lumps together, as having the same cost experiences, a store taking 2.71 cases per delivery, with a store taking over 78 cases per delivery. (RAPX 234, p. 19). He also refuses to recognize that there may be some economies involved in serving Burger's Market which took over 78 cases per delivery, as compared to A&P store No. 325 in Hammond which took a mere 17.68 cases per delivery. (RAPX 234, p. 19). One of A&P's own witnesses, Mr. Abrams who was called to explain the so-called "2-2-2" cost formula, clearly pointed out that volume plays a very important part in costs. (Abrams, Tr. 6425-6427). Dr. Solverson testified that volume was the most important element in determining cost of delivery. (Solverson, Tr. 1551-1552, 1554-1555).

Despite all this evidence of record, Mr. Havemeyer refuses to make any classifications based on size and type of store. Mr. Havemeyer's one prior Robinson-Patman cost justification in a litigated case was rejected due to the same defect. (Tr. 7685).

E. Conclusions

29. Mr. Havemeyer's Allocations Fail To Justify The Discriminations:

The mere absence of a delivery cost allocation completely eliminates all "justification" for the price discriminations in many instances (RAPX 233, pp. 41-50, 53-55, 57-63, 65-66). In the case of all other stores, other than Wilco Food Center and Tittle Valparaiso, it removes the greatest part of Mr. Havemeyer's "justification." (RAPX 233, p. 39-40, 51-52, 56 and 64; RAPX 234, pp. 3-10). 137/ Furthermore, even if Mr. Havemeyer had been able to produce competent service-time evidence, it is clear that his delivery expense allocations would have been drastically reduced, since the greatest share of the expenses therein would have to be re-allocated on a volume basis (equally per point, not producing any justification) because they were not incurred on a service-time basis. [See Findings 15(b)(iii)-(v); 20(b)

137/ In the case of Wilco Food Center, Mr. Havemeyer has allocated less delivery expense than to A&P. In the case of Tittle Valparaiso, he has allocated the same cost to each, since he has allocated the commission expense equally per point. (RAPX 234, pp. 9-10).

(iv-(v)]. Moreover, correction of the other errors cited in Findings 15(b) and 20(b) would further reduce any cost differential substantially. 138/ Thus, even if such allocations were complete on the record, most or all of the justification Mr. Havemeyer extracted therefrom would be gone.

Similarly all loading cost differences would disappear if these expenses had been allocated in the proper manner. [See Findings 15(a)(i) and 20(a)(i)]. Of course the loading cost difference in the O'Hare Study, RAPX 233, would virtually disappear, if Mr. Havemeyer would limit his allocation to only the products involved in this case, as he did in RAPX 234. [See Finding 15(a)(iii)]. Then, too, a number of other errors have been cited above in connection with the loading cost allocations. [See Findings 15(a) and 20(a)].

In the case of clerical costs, most, if not all, of the cost difference found in the O'Hare Study would have been removed if he had included only the items involved in the discrimination, as he did in Hammond. [See Finding 15(c)(viii) and compare RAPX 233, pp. 39-66 with RAPX 234, pp. 3-10]. Most importantly, however, much of this expense would be eliminated from the study entirely (as not involving any cost

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138/ Of course the Robinson-Patman cost justification provision will not allow any justification in this case based upon difference of service times, product returns, selling and merchandising expense, insofar as such differences might be due to the "limited service" terms of the Borden-A&P agreement, since such differences, if they exist, are due to the problem of "availability," not service differences. [See Findings 15(b)(ii) and 20(b)(vi), above].

difference), if these costs had been allocated in the manner in which they were incurred. [See Findings 15(c)(i) and (ii) and 20(c)(i) through (iii)]. Further, a number of other errors are cited in Findings 15(c) and 20(c). It is impossible to quantify the extent that these errors affect Mr. Havemeyer's allocation (See Lemberg, Tr. 9415), but it is clear that they have had a very substantial impact. 139/ It is also obvious that much, if not all, of any cost justification would have been removed. [Findings 15(c) and 20(c); Lemberg, Tr. 9414-9415].

In the instance of product waste, Mr. Havemeyer's cost justification would have been eliminated in connection with the larger store customers, if Mr. Havemeyer had properly classified customers and allocated this expense to A&P, as he should have. [See Findings 15(d)(i) through (v) and 20(d)(i) through (v)]. In the case of some of the smaller customers included in the O'Hare study, there is no way to evaluate the effects of Mr. Havemeyer's errors, since more of this expense probably would fall on them; but then some of the expense would also be applied to A&P stores. [Finding 15(d)]. Of course,

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139/ In the case of the O'Hare studies the elimination of the irrelevant products (those not involved in the discriminations) alone, would have completely reversed Mr. Havemeyer's results in a number of instances. (Compare with results in RAPX 234, pp. 3-9, where only relevant products were considered and some of the customers showed lower clerical costs than A&P even under Mr. Havemeyer's methodology).

to the extent any difference is due to the "availability" of the "limited service" discount proposal, it would not be cognizable in any event. (Findings 15(b)(ii) and 20(b)(vi)].

In branch selling expense also, the errors cited above in Findings 15(e), 20(e) and 24(a), materially affect Mr. Havemeyer's allocations. First of all, a very substantial portion must be eliminated -- "missionary work" -- since it is a general business expense which would apply equally to all points (if not more so in the case of A&P). [See Findings 15(e)(i), 20(e)(i) and 24(a)(i)]. Secondly, A&P stores would have to be included in the allocation of the remainder, as is noted in Finding 15(e)(iii), 20(e)(iii) and 24(a)(i). Thirdly, the amount of selling expense has been overstated in each case. [Findings 15(e)(iv), 20(e)(v) and 24(a)(iii) through (v)]. Next, there was no study of the selling expense involved solely for A&P in connection with the service of the chain store sales manager and his assistant. [Findings 15(e)(v), 20(e)(vi) and 24(a)(i)]. Further there was no classification of customers relating to the allocation of various selling expenses to the store customers. [Findings 15(e)(iv), 20(e)(iv) and (viii), and 24(a)(ii), (iii) and (vi)]. Moreover, the record shows that such selling expenses as were allocable were not allocable on a volume basis. [Findings 20(e)(ix) and 24(a)(i)]. A number of other errors are also cited in the allocation of selling expense, such as the unwarranted exclusion of sales points and Mr. Havemeyer's failure to study the manner in which these expenses were incurred. [Findings 15(e), 20(e) and 24(a)]. These errors cumulatively have, of necessity, a very substantial effect. They may well eliminate totally any difference in costs as between A&P and its competitors, especially its larger competitors. In the case of Valparaiso, almost all costs have been eliminated as being non-applicable to Tittle Valparaiso [Finding 24(a)(ii) and (iii)]; certainly all cost justification has been removed there.

In Hammond and Valparaiso there is an extra function, "credit loss," to which Mr. Havemeyer has allocated expenses to competitors only. His principal errors here were his failure to classify his customers and his failure to include A&P in his allocations. [See Findings 20(f)(i), (iii) and (iv), and 24(b)(i) and (ii)]. There were other errors also as noted in Findings 20(f) and 24(b). When A&P is included, the customers properly classified, and the other errors are removed, the remaining expenses, would apply rather evenly as between A&P and its larger competitors. [See Finding 20(f) and 24(b)]. Therefore, there would probably be no cost difference from this factor.

In the case of advertising expenditures almost all of the advertising expense allocated to the Hammond and Valparaiso stores must be removed from the study. [Findings

20(g)(i) and (ii) and 24(c)(i) and (ii)]. In all of the studies the general business nature of institutional advertising was not considered. [Fingings 15(f)(ii), 20(g)(iii) and 24(c)(i)]. Other errors cited in Findings 15(f), 20(g) and 24(c) would also have substantial effect. The results of these errors is to virtually eliminate all advertising costs in Hammond and Valparaiso and in the O'Hare study, to greatly reduce this allocation to competitors while allocating some of the expense to A&P. 140/

Again in the case of merchandising expense Mr. Havemeyer has failed to make any classification of customers. [Findings 15(g)(iv) and 20(h)(ii)]. In both the O'Hare and Hammond studies (this expense not applicable to Valparaiso) he fails to make an adequate study of Borden's records, opeations and the incurrence of expenses. Such lack of study results in serious deficiencies. [Findings 15(g)(i) through (iii) and 20(h)(i)]. It is again impossible to quantify the extent of these errors, except to note that in Hammond almost all of these expenses must be eliminated from the study, thus leaving no possibility of other than a negligible

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140/ Of course, to the extent any expenses would be left in the Hammond and Valparaiso studies, A&P would share in those expenses too.

justification even under Mr. Havemeyer's methodology. As to O'Hare, the necessary changes would surely wreak very substantial changes in Mr. Havemeyer's results.

Insofar as Overhead expense is concerned, in each instance very substantial portions of the expense must be allocated to functions which can not yield a cost justification -- the activities of Borden prior to delivery to the branch (which are related to volume). [Findings 15(h)(i), 20(j)(i) and 24(d)(i)]. Errors in the other allocations, as cited above, would work other drastic changes, as would other errors cited in this allocation. [Findings 15(h), 20(j) and 24(d)]. Again, the changes could not be quantified, but the "justification," if any, must necessarily be reduced to a small fraction of that computed by Mr. Havemeyer.

Finally, the failure to study countervailing costs incurred to A&P alone has resulted in an understatement of A&P's costs, by an indeterminate amount. [See Findings 15(a)(viii), 15(c)(vi), 15(k)(i) through (iii), 20(a)(iv), 20(c)(v), 25(a) through (d)].

The cumulative effect of all these things most certainly is to reverse the impact of Mr. Havemeyer's study and show that the price discriminations were not cost justified. In the O'Hare Study, just the elimination of a delivery allocation completely reverses the results in most cases, as noted above. In Hammond, these criticisms either eliminate or virtually eliminate the "justification" found in each of the functions of loading expense, delivery expense, branch clerical, product waste, branch selling, credit loss, advertising, merchandising and overhead. Thus the "justification" found by Mr. Havemeyer disappears. In Valparaiso the expenses used by Mr. Havemeyer have not even been shown to be applicable to sales in that area (Findings 22-24) and it is shown that there is virtually no difference as between A&P and Tittle Valparaiso, insofar as expenses are concerned. The net results are, then, that Mr. Havemeyer has not shown a "justification" for any of the price discriminations proven in this case.

30. Mr. Havemeyer's Study Has No Probative Value:

Findings 15, 20 and 22-29 all describe such serious and substantial errors and deficiencies in Mr. Havemeyer's work that his studies of the O'Hare and Hammond area (including Valparaiso) costs must be considered totally lacking in probative value.

31. Failure to Rebut Evidence In Case-In-Chief:

Therefore, A&P has failed to produce substantial evidence to rebut that evidence cited above, in Volume I of these findings, which shows that the price discrimination in favor of A&P was not cost justified. Moreover, it has also failed to rebut the evidence of record which shows that Borden sold private label milk and dairy products to A&P's Chicago Unit at a loss. (See Volume I, Finding 108-111).

F. ARGUMENT

First and foremost, it is obvious that Mr. Havemeyer's three studies do not constitute reliable, probative and substantial evidence in view of the many errors, inconsistencies, inadequate analyses, and failures to provide substantiating evidence noted in Findings 6 through 31, above. There is frequently inadequate, or no, substantiating evidence for his allocations. 141/ He has continually failed to make an adequate study of Borden's record. 142/ And his allocations

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141/ [Findings 9(a), 9(b)(i) through (ix), 9(b)(xii) and (xiii), 9(c)(v), 9(e)(iii), 9(f)(ix) through (xiv), 9(g)(i), 9(l), 10, 15(a)(ix), 15(b)(vi) and (ix), 15 (c)(v), 15(d)(i) and (ii), 15(e)(iii), 15(g)(i) and (ii), 15(n), 20(b)(ii), 20(d)(i) and (ii), 20 (e)(iii), 20(f)(iii), 20(g)(i) and (ii), 20(g)(iv) and (v), 20(h) (i), 20(j)(i), 22, 23, 24(a)(i) through (iii), 24(b)(i), 24(c)(ii) and 27].

142/ Findings 9(a) and (b), 9(c)(i) through (iii), 9(c) (v), 9(d)(i) and (ii), 9 (e)(i), 9 (f)(ii) through (v), 9(h)(i), 9(k), 9(l), 15(a)(iv) through (vii), 15(c)(iii), 15(c)(v), 15(e)(vii), 15(g)(i) through (iii), 15(h) (i), 15(l) through (n), 20(a)(iii), 20(c)(ii) and (iii), 20(e)(i) and (ii), 20(e)(iv), 20(e)(ii), 20(e)(v) and (vii), 20(f)(i) through (iii), 20(j)(i), 22-23, 24(a) (i) through (iv), 24(b)(i), 24(c)(i) and (ii), 24(d)(i) and 26].

consistently ignore important facts which would materially affect his allocations. (Findings 9, 15, 20 and 24). These failures along with the many errors cited in Findings 6 through 31, demonstrate that these three studies are unreliable and without probative value. 143/

In addition to the basic unreliability of these exhibits, however, Mr. Havemeyer has commited other serious errors in his calculations and allocations. They are as follows:

1. Failure to Classify Customers:

It is frequently noted in the above findings that Mr. Havemeyer has failed to classify the customers of Borden in accordance with size, type of store, volume of purchases and other pertinent characteristics. In the calculation of

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143/ These deficiencies do not even take into account the inadequacies in Mr. Havemeyer's checking procedures. As pointed out in Findings 9(k) and 15(m), such inadequacies in checking underlying tabulations and computations undoubtedly resulted in many errors which are not even apparent upon an examination of the cost exhibits. The multitudinous errors found during the lengthy *voir dire* examination were only such errors as could be found in the underlying documents supplied to counsel. Many tabulations were simply made on a computer without creating any underlying documents which could be checked. [Finding 9(k)].

delivery expense in the "Profitability Study" (RAPX 232), he has treated all independent stores as having one set of characteristics and A&P stores as having another, despite the fact that the record shows vast differences between the members of each group [Findings 9(f)(xi) and (xii)].

In the "O'Hare" and "Hammond" studies he has refused to recognized different classes of customers, with different cost experiences in connection with his allocations of delivery expense, clerical expense, product waste, selling expense, credit loss, merchandising expense and overhead. 144/

This omission on the part of Mr. Havemeyer is simply incredible in view of his past experiences. Mr. Havemeyer had only presented one prior Robinson-Patman type cost justification in a litigated case. That was for Bowman Dairy in the case of U.S. v. Borden (& Bowman), 370 U.S. 460 (1962). This study was rejected because of Mr. Havemeyer's

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144/ [Findings 15(b)(vi) and (vii), 15(c)(iv), 15(d)(iv), 15(e)(iv), 15(g)(iv), 15(h)(iii), 20(b)(ii) and (iii), 20(d)(iii), 20(e)(iii) and (iv), 20(f)(iii) and (iv), 20(h)(ii), 20(g)(iii), 24(a)(ii) and (iii), 24(b)(i) and (ii), 24(d)(i), and 28].

failure to properly classify customers. (Tr. 7685). Yet the record herein, as summarized in the above-cited findings, shows that he still refuses to recognize that there are different classes of grocery store customers.

In rejecting the cost studies in the Borden case, the Supreme Court stated at 471:

> In the [Bowman] study the experts charged all independents and no chain store with these costs. Yet it was not shown that all independents received these services daily or even on some lesser basis. Bowman's study indicated only that a large majority of independents took these services on a daily basis. Under such circumstances the use of these cost factors across the board in calculating independent store costs is not a permissible justification for it possibly allocates costs to some independents whose mode of purchasing does not give rise to them. The burden was upon the profferer of the classification to negate this possibility and the burden has not been met here.

The Court also indicated that a proper class of customers must be "... so homogeneous as to permit the joining together of these purchasers for cost allocation purposes." (Supra, at p. 471).

By this yardstick Mr. Havemeyer's present studies fail miserably, as is noted in the above cited findings. In each of the categories of expense mentioned, there are vast differences between the characteristics and experiences of the various customers on Borden's routes, both in O'Hare and Hammond (including Valparaiso). There are differences in the physical size and layout of the stores, the purchase volume, the services received from Borden and every conceivable characteristic. Moreover, these differences aren't only among the competing stores. The record reveals vast differences among the A&P stores as well.

But Mr. Havemeyer blithely ignores them all, as well as the above strictures of the Supreme Court. As a result, these costs studies are deficient and cannot be granted any probative value. 145/

2. Determination of A&P Store Costs On An Average Basis Constitutes Error:

In the O'Hare and Hammond studies Mr. Havemeyer has determined cost on an "average" basis for A&P stores, and then compared this "average" A&P store with specific competitors.

145/ Findings 9(f)(xi) and (xii) and RAPX 232, p. 89, reveal that this omission is not peculiar to the O'Hare and Hammond studies. Even in the "Profitability" study (RAPX 232) Mr. Havemeyer's delivery calculations are based upon the premise that all A&P stores have one uniform set of experiences, and competing stores have a different set of uniform experiences. The facts outlined in the cited findings reveal this simply is not the case.

(See RAPX 233 and 234). In RAPX 232, he has determined the purchasing characteristics of A&P, in his delivery cost analysis, on the basis that it was one giant, single customer. [See Finding 9(f)(xiii)]. The Commission has condemned such practice in the matter of National Dairy Products Corporation, 70 F.T.C. 79, 193-196, 207 (1966). 146/

In that case the Commission noted at page 194:

> The Hearing Examiner rejected respondent's cost jutisfication defense, in part, for the reason that discounts to mulit-unit purchasers must be cost justified on a store-by-store basis. We agree ... [T]he averaging of purchases has no relationship to the cost actually incurred in dealing with each store.

At pages 194-195 it states further:

> Thus, the largest independent customer respondent has in this area received only a 6 percent discount whereas a competing chain store unit of the same volume receives 12 percent, not by virtue of any savings in cost to the store but solely by reason of its membership

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146/ Aff'd, 395 F.2d 517 (7th Cir. 1968), cert. denied, 393 U.S. 977 (1968).

> in the chain ... In practice, therefore, respondent takes the over cost justification in delivery to the large stores of a chain and credits this time saved to the smaller stores.
>
> In our view, this is not a valid costing procedure under the Robinson-Patman Act.

Thus, it is not allowable to mask the higher costs of low-volume stores of a chain by averaging them out with the high volume stores. Yet, that is precisely what Mr. Havemeyer did in RAPX 233 and 234. (See for example RAPX 234, p. 13; and RAPX 233 pp. 8 and 32-35; also see RAPX 74, showing the volume brackets of A&P stores in March 1965.)

In the present case A&P does have some very small volume stores in both O'Hare and Hammond. [See Findings 15(b)(vii) and 20(b)(ii) above. Also see RAPX 74 and RAPX 234, p. 19.] The record clearly shows that its stores fall in more than one volume class.

In RAPX 74, Borden puts A&P stores in each of the six separate volume classifications, with most of the stores in the over 300 points class. And, as is noted in Finding 20(b)(iii), A&P stores in the Hammond area range from a low of only 17.61 cases per delivery to a high of 52.97 cases per delivery (RAPX 234, p. 19). This is also obviously a wide disparity in purchase volumes.

The seriousness of this practice is well illustrated by an example noted in Finding 28, above. There it was pointed out that Burger's Market, one of Borden's customers on the Hammond routes, took more than 78 cases per delivery. One of the A&P stores competing with this independent (A&P store # 325) took a mere 17.68 cases per delivery (See RAPX 234, p. 19). Yet, under Mr. Havemeyer's methodology, this small A&P store was averaged out with larger A&P stores to hide the fact that there was such a huge disparity in size and purchase volume between these two competing stores. 147/

This is exactly the practice condemned in the National Dairy case, as noted above. There the study was rejected on this basis. In the present case, this is only one of many reasons why Mr. Havemayer's studies are invalid. However, this one defect alone is a fatal deficiency, as noted by the Commission in National Dairy (Supra). [See also Kroger Co. et al. 76 F.T.C. 719, 813 (1969)]. 148/

147/ Of course, since Mr. Havemeyer resolutely refuses to classify customers, this huge difference would not be taken into account by him anyway. (See Discussion In Argument, above).

148/ Aff'd 483 F.2d 1732.

3. Failure To Consider Countervailing Costs:

As is noted in Findings 9(e)(vi), 9(j)(i) through (iii), 15(a)(viii), 15(c)(vi), 15(k)(i) through (iii), 20(a)(iv), 20(c)(v), and 25(a) through (d), above, the record shows that certain expenses were incurred by Borden in connection with its dealings with A&P, which were not incurred for other customers. Mr. Havemeyer should have studied these cost areas, but did not. (Lemberg, Tr. 9421-9422).

Such selective cost justification is not acceptable under the Robinon-Patman Act. Mr. Rowe in Price Discrimination Under The Robinson-Patman Act (1962) states

> It would be hard to defend
> a cost study which lacked
> internal consistency by
> resort to analytic
> reasoning with respect
> to one factor that would
> vitiate another 149/

The result of this error in Mr. Havemeyer's methodology is purely and simply stated by Mr. Lemberg, a Commission expert on Robinson-Patman cost justification studies, who was asked

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150/ Mr. Rowe also cities to Dawkins, Quantity and Cumulative Volume Discounts, in Univ. of Michigan Institute on Federal Antitrust Laws 109, 112 (1953), as proposing that any countervailing differences "in other costs in the area" relied on for cost justification must be considered. (Supra), at Footnote 73, p. 287).

why it is neceassary to study these countervailing costs. He answered: "Because if we don't do this, we are not going to arrive at a true cost difference." (Lemberg, Tr. 9422). (Emphasis added).

That is the clear result of this and the many other errors in Mr. Havemeyer's methodology -- he has not arrived at a true cost difference.

4. Costs Not Allocated In the Manner Incurred:

It is a basic tenet in cost analyses such as the ones here in question, that costs must be allocated in the manner in which they were incurred. (Wixon, Accountant's Handbook, 4th Ed., Chap. 9-30; See also Lemberg testimony at Tr. 9404-9420, 9434). 150/ Yet, each of Mr. Havemeyers's studies, RAPX 232, 233, and 234 are replete with allocations which do not follow this principle. 151/

150/ A&P admits that this is a valid principle of cost analyses in its "Memorandum In Response To Complaint Counsel's Objections to Mr. Havemeyer's Cost Justification Exhibits," at page 61, filed September 3, 1974.

151/ RAPX 232 - See Findings 9(b)(vi) through (viii), 9(b)(xiii), 9(b)(xv), 9(f)(vi) through (viii), and 9(g)(iv) through (viii).

RAPX 233 - See Findings 15(a)(i) and (viii), 15(b)(iii) through (v), 15(c)(i)-(ii), 15(c)(vi)-(vii), 15(d)(i)-(ii), 15(e) (i) through (iii), 15(e)(v), 15(f)(ii), 15(g)(i)-(ii), 15(h)(i)-(ii), and 15(k)(i) through (iii).

RAPX 234 - See Findings 20(a)(i) and (iv), 20(b)(iv)-(v), 20(b)(vii), 20(c)(i) through (iii), 20(c)(v), 20(d)(i) and (ii), 20(e)(i) through (iii), 20(e)(vi), 20(f)(i), 20(f)(iii)-(iv), 20(g)(iii) through (v), 20(h)(i), 20(j)(i)-(ii), 24(a)(i) through (iii), 24(a)(v), 24(b)(i), 24(c)(i), and 24(d)(i).

Just the examples of commissions and automotive expense under Mr. Havemeyer's delivery expense allocations can illustrate the gravity of this error in methodology. As is pointed out in the delivery expense findings, these expenses make up the bulk of the costs Mr. Havemeyer is allocating under this function. Yet if they were allocated in the manner in which they were incurred -- volume and volume-related -- they could not give rise to a cost difference, since they would then apply equally to each point no matter where it is delivered. [Findings 9(f)(vi) and (viii), 15(b)(iii) through (v), 20(b)(iv)-(v)]. Similar experiences would be found in each of the other cited allocations (n.151, on p. 295) where costs are being allocated in the manner calculated to create a cost difference, not in the manner in which they were incurred.

Accordingly, Mr. Havemeyer's failure to follow this basic accounting principle results in fatal error. Had he followed this proper principle of allocation, the cost differences which he found would simply disappear. (Finding 29).

5. Overhead Expenses Not allocated According To Accepted Accounting Principles:

Mr. Havemeyer has allocated all overhead (central office) expenses on the basis of a percentage of the various branch expenses allocated to A&P and to the individual competing stores. Yet it is obvious that central office expenses relate to far more than these several branch functions. 152/ Cost accounting standards published in Federal Register, December 14, 1972, Vol. 37, No. 241, Part II, pp. 26680-26686, require the allocation of home office expense directly to segments of the business to which they are related. Any residual expense must then be allocated to all of the business activities of the home office.

Accordingly, Mr. Havemeyer has erroneously allocated this category of expense. [See Findings 15(l), 20(j) and 24(d)].

6. Differences In Services Not Cognizable Because Not "Available" To Competitors:

Almost all of Mr. Havemeyer's "justification" is based on the premise that many services and functions were not performed for A&P under terms of the Borden-A&P contract, whereas they were performed for competing stores. 153/ While complaint counsel do not agree that this is so, it is important to note that the exact same service limitations were offered to competitors, only at savings far less

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152/ See Findings 15(l)(i), 20(j)(i) and 24(d)(i).

153/ His al[illegible]tions of delivery expense, product waste, branch selli[illegible] and branch merchandising are based squarely on the service provisions of this contract. (See RAPX 233, pp. 30, 8, 14-18, 20-21, 23, 26-27; RAPX 234, pp. 11-12 78). His allocations of general selling and administrative expense are also necessarily affected by this premise, since the other elements are included in its computation under Mr. Havemeyer's methodology. A review of the results of Mr. Havemeyer's allocations on pp. 39-66 of RAPX 233 and pp. 3-10 of RAPX 234, reveals that these allocations account for the greatest part of any "cost difference" as computed by Mr. Havemeyer.

substantial than those granted to A&P under that contract. Competitors were only offered a 2% discount for these limitations. (See CX 123A-B and CX 138).

If, in fact, "limited service" did provide substantial savings to Borden, and if, in fact, any or all of A&P's competitors did not take "limited service" under the terms offered, it was due to the fact that "limited service" was not made available to competitors on the same basis as it was offered to A&P. Thus the difference, if any, was not due to a "differing method" of delivery, but simply to the difference in "availability" of this pricing package.

Mr. Havemeyer himself admitted that the discount granted in connection with service limitations must be sufficient to overcome the additional expense incurred by the store, in order to induce it to accept limited service. (Havemeyer, Tr. 8334). A&P admitted that it was not interested in such a program without a very substantial discount. (Bartels, Tr. 1936). Yet, Mr. Havemeyer's logic would require competitors to accept the same service program, at much less discount, in order to preserve their rights under the Robinson-Patman Act; even if this meant compounding their loss, or disadvantage, by requiring then to incur more in-store service costs (as the result of reduced service from Borden) without an adequate discount to compensate them for it. Such a "justification" theory is obviously contrary to the intent of Section 2(a) of the amended Clayton Act.

A&P's cost justification theory, in essence, amounts to this: "A buyer may legally discriminate in price if he wraps up the price package in service term and offers the same service to others at a much higher, unattractive price, which the competitors cannot accept. The difference in service terms will then justify the price difference." Such logic is clearly contrary to the meaning of Section 2(a) of the amended Clayton Act.

The basic flaw in this theory is that it ignores the real difference between the deals granted to the favored and unfavored competitors. The real difference is not a "differing method" of delivery, but the difference in "availability" of this price package as between the favored and unfavored competitors. 154/

The cost justification provision of the Robinson-Patman amendment to the Clayton Act provides for only those cost differences which are due to "differing methods or quantities" of sale or delivery. [Section 2(a) amended Clayton Act]. In this present problem, the cost difference posed by respondent A&P is not one of "differing methods" of delivery but one of difference in availability of a service-price package deal. Such difference is not cognizable under

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154/ The terms of service cannot be separated from price in these offers. They were not offered separately. They are dependent on each other. (CX 123A-B and 138).

Section 2(a) of the amended Clayton Act. [See Findings 15(b)(ii), 15(q) and 20(b)(vi) for further discussion of these fact.]

7. The O'Hare and Hammond Studies Do Not Cover The Entire Discrimination Periods In Any Event -- Applicable To Two Months Only:

The O'Hare study is based on the "cost experiences" of Borden for only one month -- March 1966. It was admitted that the Borden records were not studied over a representative period of time to determine whether such experiences were typical monthly experiences of Borden that could be applied over some greater period of time; or even that they were complete. [See Finding 15(l).] The Hammond study, in a similar manner, was basically premised on Borden's "cost experiences" for one month -- October 1969. In this instance, Mr. Havemeyer did select some expenses from the "this year to date" column of Borden's records; where there was no entry for a current month, or where he thought Borden's experiences had changed drastically and the year-to-date figure better suited his needs, or for reasons left unexplained. (See Finding 26.) Again there was no study of the Borden accounts on a monthly basis, over a representative period of time. (See RAPX 75 and 80-90.)

Thus, the cost experiences of Borden in each case are for only one month, at best, and they have not been shown to be typical of any greater period of time. 155/ But the evidence of discriminations extend over a much greater period of time and involve periods of changing pricing experiences.

In the O'Hare Branch the evidence of discriminations extends over several years. (Volume I, Finding 72(c), (g). It is shown that the price difference was increased in May 1966, after Borden passed on cost increases on Borden label which A&P would not accept on private label. (Volume I, Finding 72(c).

In the Hammond area the price discriminations were also shown to exist over a several year period. (Volume I, Findings 67, 70). The primary periods of proof here were for October 1966 through March 1967 and June 1969 through March 1970. Again the record reveals substantial changes in the price differences during this long period. (See CX 187).

Thus a cost study prepared for the O'Hare area for March 1966, and not shown to be typical of any other period, could

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155/ Indeed, the record shows that there is not even substantial evidence showing the costs as selected by Mr. Havemeyer are even representative of those months. (See Findings 15(a)(iv), 15(l) and 26.)

not be used to justify price differences in other time periods, particularly after that price difference has been widened. 156/

The same holds true in the case of the Hammond study. By Mr. Havemeyer's own admission, the October 1969 experiences were not even typical of earlier in that year, since it was his "understanding that the Hammond Branch was being reduced in facilities at this time . . ." (Tr. 8723). Moreover, an examination of the accounts used in Mr. Havemeyer's computations show many other disparities when the year-to-date figures are compared to October 1969 figures, as well as when 1969 figures are compared to 1968 figures. (See Finding 26.)

Certainly, if there are problems in comparing costs just within the year 1969, there are even greater problems in applying them to October 1966-March 1967, or other periods. For example, in RAPX 85 the one entry "Provision Bad Loans" had grown three-fold from the prior year. In RAPX 86, the "supervision" expense had been reduced from $1,708 in October 1968 to zero in October 1969. A perusal of RAPX 80-90 will reveal many similar changes. (See Finding 26.) 157/

157/ See, for example, the very narrow "justification" claimed by Mr. Havemeyer in connection with many of the O'Hare customers. (RAPX 233, pp. 39-66). It would only take a very slight change in the costs used by Mr. Havemeyer, or in the price differential, to reverse the results.

157/ Changes were also occurring in the O'Hare cost experiences, as can be seen by comparing RAPX 71 (the May 1965 records) with RAPX 72 (the March 1966 records).

Moreover, the price differences had changed drastically during the time periods covered by complaint counsel's proof. CX 187 shows that the price differences had been greatly reduced for most of the stores in question, including the very important Tittle Valparaiso store, during the later time periods used by Mr. Havemeyer. For instance, CX 198A shows that the percent of discrimination (overcharge) for the Tittle Valparaiso store in October 1969 was down to 5.8% [even lower than the average for the whole 10 month period in 1969-1970 -- which was at 6.7% (see CX 187)]. However, during the October 1966-March 1967 period, the average percent of discrimination was 17.5%, more than three times that of October 1969. RAPX 234, p. 10, shows that the "over-justification" computed by Mr. Havemeyer is less than 1 cent per point for this store in October 1969. It would appear that even by using Mr. Havemeyer's own discredited methodology there would still be an unjustified price discrimination in favor of A&P during the earlier period. 158/

158/ As noted above, the discrimination against Tittle Valparaiso was 3.0172 times as great in 1966-1967 as it was in October 1969. (5.8% divided into 17.5%). The amount of that price difference in October 1969, on a per point basis, was computed by Mr. Havemeyer on p. 10 of RAPX 234 as being $.009647. When this is multiplied by 3.0172 it gives a price difference of $.029107, based on the 1966-1967 discrimination rate. When we subtract the "marketing cost" difference computed by Mr. Havemeyer on p. 10 of RAPX 234 ($.019609) from this price difference, there is still an unjustified portion of the price discrimination amounting to $.009498 for the 1966-1967 period, almost a penny per point (quart equivalent); even using Mr. Havemeyer's methods.

CX 187 shows that most of the other Hammond customers also suffered far higher discriminations during the 1966-1967 period.

In short, there is just no way that Mr. Havemeyer's cost study for Hammond-Valparaiso in October 1969 can justify the much larger differences in the 1966-1967 period, or possibly, even in the rest of the 1969-1970 study. Similarly, the O'Hare study for March 1966 can in no way be used to justify much larger discriminations during later periods. Moreover, constantly changing costs would vitiate the studies for other time periods, even if there were not changes in pricing to these customers.

In Utah Pie Company v. Continental Baking Co., 386 U.S. 685 (1967), the Supreme Court noted the difficulty of applying a cost study for one time period to other time periods. In that instance the study covered 1959 and earlier, and was considered to be of questionable value insofar as proving cost justification in 1960 was concerned. (Supra, at 695, n. 10). There, the cost study had a much broader base than Mr. Havemeyer's being based upon a year or more, rather than one month. Yet, there was serious question of its applicability to later time periods. No mention was made of any pronounced price changes or cost changes in the interim period.

The problems of applicability in the instant case then, are insurmountable. Here there are shown to be drastic changes in both pricing and costs as compared to other time periods to which these studies are to be applied. They are, therefore, obviously not reliable or probative as to these periods. 159/

For this additional reason, Mr. Havemeyer's "cost studies" are unreliable and non-probative and fail to justify the very substantial price discriminations in favor of A&P.

Summary Statement

For all of the above reasons Mr. Havemeyer's cost justification studies are totally lacking in probative value. They do not rebut the substantial evidence introduced by complaint counsel showing that the discriminations in favor of A&P were not cost justified. In fact, in at least one instance, the Tittle Valparaiso store during the 1966-1967 time period, his study appears to substantiate such evidence showing that the price discrimination could not be cost justified. Accordingly, Mr. Havemeyer's studies -- RAPX 232, 233 and 234 -- should be disregarded entirely and the case decided on the basis of the substantial evidence of record, outlined in

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159/ Of course, they are not reliable or probative of any time periods, even the months for which they were prepared, as is noted in the numerous other arguments, findings and conclusions set out above.

Volume I of the findings, which shows that the price discriminations were not cost justified and that, actually, Borden sold the private label milk and dairy products to A&P at a below cost price.

Respectfully submitted,

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John J. Mathias,

Edwin R. Soeffing

Edwin R. Soeffing,

Andrew G. Stone

Andrew G. Stone,
Counsel Supporting
the Complaint.

7. Case and Company's Study of the Profitability of Borden's Proposal and of Cost Justification with Respect to the Prices Offered A&P

A&P's proposed findings on Case and Company's study of the profitability of Borden's final proposal and of cost justification with respect to the prices offered A&P are set forth in A&P Findings 428-958 on pages 564-926 in Volume II.

8. The Evidence Relied on by Complaint Counsel Does Not Show a Lack of Cost Justification or That A&P Was Aware That the Prices Were Not Cost Justified

a) Complaint Counsel's Effort to Show That A&P Knew That Borden's Prices to It Were Not Cost Justified

203. In support of their contention that A&P should have known that the prices to it were not cost justified, Complaint Counsel first urge that "Mr. Malone prepared a study of Borden's Chicago-Calumet area costs at A&P's request (CX 23-25A)," and that this study was submitted to A&P. They claim that "the most cursory review of this study shows that Borden's final Chicago Area prices did not cover its costs" (C.C. Finding 84a). They further claim that Borden also told A&P that "its costs of serving A&P stores outside of A&P's 'Chicago-Calumet area' were higher than its

prices," and cite CX 21U as their source (C.C. Finding 84b).

204. A careful look at CX 23A-25A will demonstrate the questionable nature of this so-called "study".

205. As Complaint Counsel recognize, "Mr. Malone's cost study (CX 23-25A) was submitted to A&P to justify" (C.C. Br. 130, n. 54) earlier cost figures reported to A&P. What they fail to acknowledge is that the "study" was prepared to respond to A&P's observation that the earlier figures which Borden had submitted in support of its prior bid were "substantially above similar costs in Metropolitan New York market" (CX 23A, first paragraph). The Chicago costs were higher than the New York costs by $.0135 per quart, $.0312 per half-gallon and $.0634 per gallon (CX 23B). A&P was well justified in showing considerable skepticism as to this attempted justification by Borden of its bargaining position.

206. Borden had presented cost figures in support of its Chicago bid. To Borden's undoubted surprise, A&P compared those cost figures with cost figures that A&P had obtained from Borden in the New York market, and found the New York costs to be substantially lower. It is no wonder, therefore, that

Mr. Bartels showed something less than whole-hearted enthusiasm for a detailed explanation by Borden attempting to justify its inflated Chicago costs (CX 25B). It is entirely reasonable for a buyer to view skeptically a claim by a Chicago seller, attempting to justify a high price, that expenses in New York are lower than his. Particularly suspect was the claim made by Borden here that its Chicago costs for containers, production and delivery were 22.5% [$.0135 + $.0600 (CX 23B)] higher than New York's.

207. An examination of the "study" (CX 23-25A) and a comparison with other documents prepared by Borden confirms that skepticism on the part of A&P's buyer was well warranted. As the first step in its justification of the higher Chicago cost, Borden began with a sleight-of-hand adjustment of the New York and Chicago raw milk costs. It executed this adjustment by claiming that the cost of moving milk from its Woodstock plant, amounting to $.0076 per point, and which it had included in distribution expense in its earlier Chicago figures, should be subtracted from those distribution expenses and added onto Chicago's raw milk cost. Borden claimed that such hauling costs had been included in the New York raw milk costs (CX 23B-C). In support of this

claim, Borden referred to a Schedule No. 1, which has been received as CX 24A.

208. When we examine CX 24A carefully, we can see the legerdemain involved. Borden states that an addition of $.3529 per hundredweight, or $.0076 per point, must be added to the Chicago raw milk costs to adjust them because a comparable function was included in a $.70 figure which was incorporated in raw milk costs in New York (CX 23C). This increase in the Chicago raw milk price is crucial in Borden's justification of the New York-Chicago difference because it permits a comparable deduction of $.0076 per point from the "other distribution expense" portion of the Chicago delivery costs. By means of this deduction Borden went a long way toward reducing the spread between New York and Chicago distribution expense. The 70¢ which was included in New York raw milk costs included "hauling in bulk tanks to city plants" (CX 24A). The Chicago cost which Borden reclassified to raw milk cost was identified as "hauling to City Distribution Points" (CX 24A). It is clear that the New York costs were referring to the hauling of raw milk from the country receiving plant (CX 24A) to Borden's processing plants, since finished milk products are not shipped in bulk tanks. The Chicago cost for this allegedly comparable function was incurred for the hauling

of processed milk from Woodstock to Chicago distribution points, such as O'Hare, "from which location the products are loaded in route trucks for distribution to stores" (CX 24A, n. (a)). The so-called comparable functions of moving milk at New York and Chicago are, thus, clearly not comparable. The New York cost involves the movement of raw milk which may properly be added to raw milk costs; the Chicago cost the movement of the finished product which is properly part of the delivery of product costs.

209. A further indication of the roughness and unreliability of these calculations is seen in the treatment of production or processing expense. An examination of CX 24C and CX 24D indicates that the same figure of $.0200 was used for the cost of processing a quart of milk in both New York and Chicago and that the half-gallon and gallon figures were taken as simple multiples of this figure, $.0400 and $.0800, respectively. It is obvious that Mr. Malone was making no effort at precision and that he took no account of the anticipated processing efficiencies at the new Woodstock plant.

210. CX 24 and CX 25 also exhibit inexplicable internal inconsistencies. CX 25A calculates an average wage cost per point for Chicago, which includes wages, commissions and fringe benefits, of $.0192. CX 24B also sets out a

calculation of wage costs, commissions, and fringe benefits on a per point basis. That schedule shows wage costs and commissions of $.0171 per point and fringe benefits of $.0027 per point for a total of $.0198. No reason appears why the two figures do not correspond, particularly since the average points per delivery day shown on CX 24B (3,266) are exactly one-sixth of the weekly route load in points shown on CX 25A (19,596). Even more puzzling is to compare these figures with the figures shown on CX 24D, the particular page of these exhibits on which Complaint Counsel rely (CC Br., p. 130). Under the "Per Quart" column of CX 24D appears a figure of $.0225 which is identified as "Route Delivery Expense (Man & Truck Only)". In arriving at the total delivery expense on this schedule, however, there is added to this figure a figure of $.0049, identified as "Other Distribution Expense". Strangely enough, however, this figure of $.0049 corresponds exactly with the figure set out on CX 24B opposite the title "Route Truck Expense". Thus, if the figure of $.0225 did in fact include truck expense, as the title on CX 24D indicates, it would appear that the truck expense was included twice in the computation which appears on that page.

211(a). It is also evident from an examination of CX 24B and CX 25A that the delivery expenses Mr. Malone has calculated on CX 24B are at best Borden's average costs to serve all its customers, and are not its costs of serving A&P either at that time or its anticipated costs of selling to A&P under a stripped-down delivery service program after Woodstock opened. Of course, Mr. Malone himself testified that these "studies" were not actual cost studies directed specifically to the cost of doing business with A&P (Malone Dep., 237-38). A comparison of the data on CX 24B and CX 25A will confirm that testimony.

211(b). It is evident that no adjustments for private label service were made by Mr. Malone. CX 25A, for example, arrives at an average route wage cost of $.0192 per point for Chicago by dividing Chicago's total weekly route wage cost for a route, calculated from the rates set out in the Chicago Union Contract by the weekly route loads in points. All of the other calculations set out in these exhibits appear to be the same sort of thing. As has been noted, for example, the figure shown on CX 24B uses a similar, but not identical, figure for wages, commissions and fringe benefits. It is quite apparent, therefore, that the delivery costs appearing on CX 24B and 24D are Borden's average costs of serving all its customers. These delivery costs do not reflect the savings Borden could expect from the introduction of the drop-delivery private label program.

212. It should also be recalled that Mr. Malone testified that the costs appearing on the bottom of CX 54B (and two of those costs, clerical and supervision, appear in the exact same amounts on CX 54B and CX 24B) were not applicable to sales of private label milk to A&P (Malone Dep. 249).

213. The costs set forth in CX 21U were not explained in any reports proffered by Borden to A&P. It is apparent from an analysis of the costs on CX 21U, however, that they suffer from the same infirmities as those presented on CX 24D. The container and production expenses are the same. The exact same swollen "other distribution expense" of $.0125 per point appears on CX 21U as Borden tried to explain away on CX 23 (compare "other distribution expense" on CX 21U with CX 23A). While the delivery expenses are somewhat lower on CX 21U than on CX 24D, this is no more than a reflection of the fact that Borden was proposing to offer only 3 day per week delivery service in much of the outside areas (CX 21C, CX 21M).

214. The costs reflected on CX 21U, therefore, were clearly prepared in the same manner as those on CX 24D. Since the costs on CX 24D were shown to be either distortions or inapplicable to A&P, those on CX 21U are likewise worthless.

b) Complaint Counsel's Effort to Show That the Prices to A&P Were Not In Fact Cost Justified

215. Complaint Counsel rely on CX 54, CX 87 and CX 206 to establish that Borden's costs were not cost justified (CC Finding 101). That reliance is misplaced.

216. Complaint Counsel advance the Malone so-called "cost study", CX 54, as proof of Borden's costs. Mr. Havemeyer has pointed out in his testimony that it would not be appropriate to use the unit costs set out in CX 54B (Havemeyer Tr. 8160). He explained that it is obvious from an examination of Mr. Malone's study that Mr. Malone determined expenses for the functions identified in his study as "trailer-loading", "truck-loading", "delivery, man" and "delivery, truck" on a simple per point basis without any consideration of the costs involved in performing these functions for individual products, i.e., the half-gallon cost is half the gallon cost, and the quart cost is half the half-gallon cost in Mr. Malone's study (Havemeyer Tr. 8160-61). Mr. Havemeyer also

were then summarized on subparts A and B of CX 188 (Bitting Tr. 449).

269. The percentage of "common items" purchased by Burger to all of its purchases from Borden is also set out on CX 188 B (Bitting Tr. 452). All of the other Indiana Comparison Exhibits were prepared in the same manner and are intended to convey information similar to that displayed in CX 188 (Bitting Tr. 619, 622-23, 637, 642, 644, 645, 666-67, 667-68, 670, 673-74, 676, 690-91).

270. One reason why the Indiana Comparison Exhibits do not reliably reflect the net prices paid by the non-A&P customers is the failure to properly authenticate the underlying Borden rebate information relied upon by Mr. Bitting. No evidence was presented that this data constituted complete information as to all of the rebates paid by Borden to the selected Indiana customers. Further, there was no showing that Mr. Bitting had the necessary Borden documents that would tell him how to properly allocate those rebates between the "common items" (which alone were to be compared with A&P's private label purchases) and the other items purchased by these non-A&P customers.

(footnote continued from previous page)

In addition to these changes, two exhibits, CX 190 and CX 19 were not revised but simply withdrawn. All testimony originally elicited on the alleged "discriminations" suffered by those customers, Dick's Market and Southtown Market, we assu will be stricken from the record.

271. Indeed, an examination of the evidence on the net prices actually paid by the non-A&P Indiana customers demonstrates that Mr. Bitting has incorrectly reported net prices. This is so, in part, because the rebate checks relied upon by Complaint Counsel in compiling these exhibits were incomplete. It will be demonstrated below that at least one check to Burger's Market and an entire set of rebate checks to Wilco had not been made available to Mr. Bitting, and that the worksheets for Model did not include accurate information on the proper method of calculating and allocating rebates.

272. Mr. Bitting acknowledged that for the periods January through March 1967 and January through March 1970 he did not have detailed rebate information for the non-A&P Indiana stores (Bitting Tr. 70). He testified that while he believed that he knew what rebates Borden paid during these periods, he was missing the worksheets that would indicate how the rebates were determined (Bitting Tr. 70).

CX 188 - Burger

273. In an effort to bridge the gaps in the data he was relying on for January, Feburary and March 1967 for Burger, Mr. Bitting claimed it was appropriate to allocate

the rebates for these months proportionately among all of Burger's purchases. In doing so, Mr. Bitting assumed that Borden was following the same method of allocation in 1967 as it used in 1966 and 1969 (Bitting Tr. 4111-12). Mr. Bitting testified that, in these other years, i.e., 1966 and 1969, Borden had calculated its rebates to Burger on a straight percentage of all items purchased (Bitting Tr. 4114). The fallacy in this assumption was demonstrated on cross-examination when Mr. Bitting conceded that the Borden discount policy he was relying on varied not only from customer to customer but from month to month for the same customer (Bitting Tr. 4115-17). In fact, he acknowledged that the discounts granted to Burger themselves varied and were not consistent from October 1966 through January 1967 (Bitting Tr. 4118).

274. Complaint Counsel attempted to support Mr. Bitting's assumption by reference to the testimony of Mr. Kristoff. According to Mr. Mathias, Mr. Kristoff had testified that Burger had received a rebate once a month and that the rebate was based upon a percentage of total purchases (Mathias Tr. 4119). Whatever Mr. Kristoff said on this subject -- and his testimony is by no means as clear on this matter as asserted by Complaint Counsel -- Complaint Counsel may not rely on Mr. Kristoff's testimony for this purpose. During Mr. Kristoff's cross-examination, counsel for A&P sought to

determine the actual prices paid by Burger. This line of questioning was cut short, however, upon Complaint Counsel's representation that they had "not gone into the net price paid by the witness [Burger]" (Kristoff Tr. 2364, 2365-66). Accordingly, Mr. Kristoff's testimony cannot be properly be relied on by Complaint Counsel to support a determination by this Court that CX 188 properly sets out Burger's net price.

275. Although cross-examination of this witness was severely limited, counsel was able to establish that Burger received a second check from Borden in January 1967 (Kristoff Tr. 2281-82) as a rebate on its milk and dairy purchases (Kristoff Tr. 2332-34, 2347-48). This second check (in the amount of $207.63; Kristoff Tr. 2347), was not included in Mr. Bitting's calculations of Burger's net price (Kristoff Tr. 4122-23). The payment of this rebate to Burger is conclusive proof that Borden either did not provide Complaint Counsel with all rebate information necessary to calculate Burger's net prices, or if supplied, it was ignored. In any event, the alleged calculation of the Burger discounts is clearly inaccurate and should be stricken.

CX 191 - Model

276. In calculating Model's net prices, Mr. Bitting attributed the entire rebate allegedly received from Borden for the period October 1966 to January 1967 to a non-common item, i.e., glass gallons of homogenized milk (Bitting Tr. 4186).* He did so in spite of the fact that the worksheet for Model, CX 288 B-C, simply indicates a special reduction on gallons and does not limit the discount to only glass gallons. Such an allocation was highly speculative and improper. Moreover, the effect of such an allocation is, of course, to treat Model's prices as though they were net prices (Bitting Tr. 4187, 4192).

277. In an effort to justify the allocation of the entire rebate to glass gallons of milk in the period January to March 1967, Mr. Bitting stated that he multiplied the total number of glass gallon units purchased by Model in each of those months by four cents (the rebate payable on "gallons" to Model in October, November and December 1966, according to CX 288 B-C), and came up with the exact amount of the rebate check for January and March 1967 (Bitting Tr. 4180). For the month of February, however, he was not able to arrive at the amount of the rebate check, i.e., $79.36, by such a process (Bitting Tr.

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* These rebates were $56.43, $57.48 and $65.12 for the period October 1966 through December 1966 (CX 265 G-I).

4180-81). If the amount of this rebate check is divided by four cents per unit, one would conclude that the total glass gallon units purchased in that month were 1,234; the invoices for the period, however, indicated that 1,328 glass gallons were purchased (Bitting Tr. 4181, 4184).

278. This analysis, we submit, demonstrates that Borden did not calculate the rebate to Model for February 1967 in the manner assumed by Mr. Bitting. This discrepancy demonstrates, moreover, that the Borden worksheets, CX 288 B-C, upon which Mr. Bitting relied so heavily in preparing his Indiana comparisons do not accurately reflect Borden's rebate calculations.

CX 202 - Wilco

279. The net prices determined for Wilco by Mr. Bitting on CX 202 failed to take into account some of the rebate checks received by that customer. Glen W. Gintert of Wilco testified that Wilco received two rebate checks on its milk purchases each month from Borden. One of those monthly checks was entered into Wilco's books as "an interest" payment (Gintert Tr. 2464, 2514). The second set of rebate checks, although not deducted by Mr. Bitting from Wilco's invoiced price to determine

net price, have been introduced by Complaint Counsel as CX 290. This exhibit shows payments from October 1966 through March 1967 of $184. The existence of these additional rebate checks demonstrates once again that Complaint Counsel failed to consider all deductions in calculating net prices.

280. CX 202 is also defective in view of the arbitrary decision to allocate Wilco's promotional allowance of $83.33 per month for the period June 1969 through December 1969 among all items purchased (Bitting Tr. 4242-43).

CX 194-198 - Tittle

281. There is evidence in the record of two payments received by Tittle that were not considered by Mr. Bitting (Bitting Tr. 4220-21). Further, additional payments by Borden to Tittle reflected in Tittle's ledger sheets were not considered by Mr. Bitting in preparing his comparison exhibits for the Tittle stores (Bitting Tr. 4490, 4492; RA&PX 29 A-C, D, 58).

282. With the exception of the rebate checks for the period

October 1966 through December 1966, which purport to show some of the rebates some of Borden's non-A&P customers in Indiana received during a part of 1966 (CX 265 A-U), neither the record of the hearing nor Complaint Counsels' Proposed Findings reflect what checks were actually considered by Mr. Bitting. Mr. Rouse, one of the witnesses from Borden called by Complaint Counsel to "authenticate" the underlying documents, simply stated that he had produced certain records at an earlier date in response to a Commission subpoena, and that some documents on the table in the hearing room (without any further identification) were similar to those he had previously produced (Rouse Tr. 2140, 2141-42, 2155, 2158, 2160-61). No evidence, however, was offered that the documents placed in front of Mr. Rouse or to which his attention was directed were the same ones he had produced at the original subpoena return (Rouse Tr. 2138-2140, 2142-43).

283. Mr. Rouse could not state where these records came from; he apparently did not collect them himself (Rouse Tr. 2138). He testified that some unidentified documents which were shown to him came not from his office, but rather from another office of the Borden Company in Columbus, Ohio (Rouse Tr. 2195-96).*

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* All Mr. Rouse could state on the question of the completeness of these records was "if [Complaint Counsel] have shown me all of those records that I turned over, they are all here." (Rouse Tr. 2156). This is clearly not enough.

284. As is stated above, the record does not indicate which rebate checks and worksheets Mr. Rouse was supposed to authenticate. Many of the documents were not even marked for identification. This we submit is insufficient, particularly in light of the degree of reliance Complaint Counsel has placed on these records; and this improperly impeded A&P's examination of both Mr. Rouse and Mr. Bitting as well. Whatever Complaint Counsels' intention, this procedure obscured the fact that Mr. Rouse did not produce all the documents used in calculating rebates to Borden's Indiana customers at the original subpoena return on November 19, 1970.*

285. The Indiana Comparison Exhibits are also defective because they do not compare all of the allegedly injured competitors' dairy purchases from Borden against all of A&P's purchases. Nor do they even offer a comparison between all items which were purchased by both A&P and the non-A&P customers as was done prior to their revision.

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* In his letter to Borden counsel, dated December 8, 1970, Complaint Counsel stated that a review by the FTC staff of the documents submitted by Mr. Rouse revealed missing documentation. There follows a long list of missing documents. Included in this list are "Borden rebate records for Wilco Food Center, and Model." Further correspondence from Borden counsel, dated February 24, 1971, indicates that Borden counsel forwarded "rebate records for the individual stores in question", which "cover the years 1966 and 1969. We are attempting to locate the records for 1970 and will forward them to you as soon as possible."

ARGUMENTS APPLICABLE TO ALL COUNTS

JURISDICTION

COMPLAINT COUNSEL HAVE NOT ESTABLISHED ON COUNT II THAT A&P RECEIVED AN ILLEGALLY DISCRIMINATORY PRICE IN COMMERCE ON ITS ILLINOIS PURCHASES FROM BORDEN NOR HAVE THEY ESTABLISHED THAT THE ACTS AND PRACTICES ALLEGED IN COUNTS I AND III WERE IN COMMERCE*

FACTUAL FINDINGS:

388. Complaint Counsel's argument that all the fluid milk and dairy products Borden processed and sold to A&P were "in commerce" within the meaning of the Robinson-Patman Act is based on the fact that a substantial portion of the raw milk Borden processed at its Woodstock plant was shipped into Illinois from Wisconsin. They further argue that the raw milk shipped from one state into another did not lose its "interstate character" when it was processed at the Woodstock plant because:

> "At the processing plant milk was simply inspected, cooled, standardized, in some cases fortified, pasteurized and homogenized [Tr. cite omitted]. Processing of the major fluid milk items -- milk and creams * * * is a merely instantaneous,

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* A&P concedes that the sales by Borden to the A&P stores in Indiana were "in commerce" and that there is therefore jurisdiction under Section 2(f) with respect to those sales only. It is important, however, to determine just which sales were "in commerce" since this may affect (a) which evidence as to the alleged price discrimination may properly be considered, (b) what relief is appropriate, and (c) the impact of any ruling on related private actions.

> mechanical procedure which does not alter the product's chemical composition [Tr. cite omitted]." (C.C. Finding 60)

This position is not supported by the facts in the record or the legal authorities cited by Complaint Counsel. The processing of raw milk at the Woodstock plant into homogenized Vitamin D milk and the processing and/or manufacture of 2% milk skim milk, chocolate milk, buttermilk, half & half, whip cream, sour cream, egg nog and onion dip -- each of which was sold to A&P under the private label program -- produced products so physically, biologically and chemically different from raw milk that the interstate flow of commerce of raw milk was terminated at Borden's processing plant in Illinois.

A. Qualifications of Charles C. Tise

389. Charles C. Tise, Borden's Director of Production and Engineering for Dairy & Service for the entire northern half of the United States, has responsibility for 26 of Borden's milk and ice cream plants and all phases of production and distribution from the time raw milk arrives at the processing plants through processing, manufacture, packaging and loading for distribution. Mr. Tise has a BA degree in agriculture from the University of Missouri where he studied dairy manufacturing (1947) (Tise Test. pp. 5761, 62).

390. Mr. Tise has worded continuously for Borden since 1945 in various capacities: Director of Production, ice cream plant, St. Louis, Missouri; Plant Superintendent, milk and ice cream plant, Huntington, West Virginia; and Assistant Director of Production and then Vice President of Production & Engineering responsible for 35 milk processing plants (Tise Test. pp. 5763-68).

391. During his employment with Borden, Mr. Tise has been responsible for the selection and design of milk processing equipment, the processing of raw milk into homogenized Vitamin D milk and the full line of milk by-products including those sold by Borden to A&P during the period 1965-70, equipment maintenance and the hiring and training of people to operate the processing equipment in Borden's plants (Tise Test., pp. 5764-66). Mr. Tise is particularly well qualified to testify how raw milk was processed into pasteurized, homogenized Vitamin D milk at Borden's Woodstock, Illinois processing plant and how milk by-products were manufactured at that plant.

B. Qualificationsof Dr. Dee McDonald Graham

392. Dr. Graham, Professor of Food Science and Nutrition at the University of Missouri since 1969, has had extensive training and teaching experience in the area of nutrition, food quality, the fortification of food products, including milk and dairy products, food labeling, the processing of raw milk and the manufacture of milk-by products. For several

years (1969-71), Dr. Graham supervised the operation of the University of Missouri's fluid milk processing plant which produced pasteurized and homogenized fluid milk and milk by-products. In this position, Dr. Graham supervised and was responsible for equipment selection, establishing processing techniques including pasteurization, homogenization and fortification of raw milk and quality standards. He also determined the products to be produced, including homogenized Vitamin D milk, and the by-products to be manufactured such as whipping cream, half & half, sour cream, cottage cheese and chocolate milk (Graham Test. pp. 6263-67).

393. Dr. Graham's principal credentials include a Bachelor of Science degree from Mississippi State College in 1950, where his major was in dairy manufacturing. While there he studied the technology for processing and manufacturing the general line of products processed and manufactured in most dairy plants including fluid milk and its by-products and he worked in the College's milk processing plant where he was responsible for quality control. Dr. Graham obtained a Master of Science degree in Dairy Microbiology from Iowa State College in 1951, and a Ph.D. from that institution in 1954 (Graham Test. pp. 6267-69).

394. Dr. Graham was an Associate Research Assistant and an Associate Professor at Clemson College from 1953 until 1958

in the Department of Dairy Husbandry where he supervised projects relating to milk flavoring and milk manufacturing. Dr. Graham has worked for the Pet Milk Company where he was manager of milk products development. Dr. Graham also held the position of Associate Director of Research and later Technical Director of the Pet Milk Company's Grocery Products Division where he was responsible for the Division's research and the development of new products such as evaporated milk, infant milk formulas, etc. (Graham Test. pp. 6270-72).

395. Dr. Graham is a member of seven professional associations including the American Dairy Science Association, where he has served as a Director and Chairman of the Dairy Food Division, the American Academy of Pediatrics and the National Academy of Sciences. Dr. Graham has also conducted seminars for the U. S. Department of Agriculture (USDA) and in 1974 conducted a seminar for the Nutrition Institute of the USDA on the subject of how the nutritive value of fluid milk and by-products is affected by pasteurization and homogenization. Dr. Graham has also written and had published a substantial number of articles, as listed in RA&PX 57, on such subjects as the processing of milk and the manufacture of milk by-products (Graham Test.. pp. 6269-75).

396. Dr. Graham is particularly well qualified to testify concerning the changes that occur when raw milk is pasteurized,

homogenized and fortified with Vitamin D and the manufacturing processes involved in the production of milk by-products.

C. The Milk Borden Sold to A&P was Pasteurized, Homogenized and Fortified with Vitamin D

397. During the period 1965-1970, raw milk was processed at Borden's Woodstock plant to produce homogenized Vitamin D milk in the following manner (Tise Test. pp. 5768-69):

(a) The raw milk was collected from the farm or other loading points in stainless steel over-the-road tankers and was delivered to the Woodstock plant where it was submitted to a series of quality tests that checked odor, temperature, acidity and in some cases flavor. The acidity test was undertaken to determine the growth of certain bacteria in raw milk that convert lactose in milk giving milk a sour taste. Product that did not pass these tests was rejected (Tise Test. pp. 5774-76).

(b) Raw milk that passed this initial test was unloaded into two 35,000 gallon raw milk storage tanks by stainless stell pipes and a series of air-operated and electrically controlled valves (Tise Test. pp. 5776-77).

(c) Raw milk from the storage tank was then pumped through a clarifier where centrifugal force was used to remove sediment and other extraneous impurities from the raw milk such as blood and body cells from the cow's mammary system. Raw milk from the clarifier was then pumped to a cooler which reduced its temperature to 38° F. or below and it was then placed in one of fourteen stainless steel storage tanks with a capacity of 10,000 to 25,000 gallons and held at 38° F. to maintain its quality (Tise Test. pp. 5780-82).

(d) Raw milk that had been clarified and cooled was then standardized and its butterfat content made to conform to local, state and federal regulations and Borden's company standards. As required, skim milk was added to reduce the butterfat content and cream was added to increase it. Also, each day a portion of the raw milk was processed in a separator to separate skim milk and cream to be used as required for standarization and in manufacturing by-products. This separation was accomplished by pumping the raw milk through a set of plates where it was warmed from 38° F. to 110° F. and centrifugal force used to separate the butterfat (lower in specific gravity) from the skim milk (higher in specific gravity) (Tise Test. pp. 5783-84).

(e) After standardization, the raw milk was pasteurized. This was accomplished by the high temperature short-time method. With this method, raw milk from the raw milk storage tanks was pumped to smaller tanks where it was forced through a heat exchange unit called a regenerator (using cold raw milk on one side of the plate and hot pasteurized milk on the opposite side). The raw milk entered the regenerator at 40° F. and was discharged at 138° F. to 140° F. and it then passed into the heating section where it was heated to 175° F. for 20 seconds (Tise Test. pp. 5785-87).

(f) The pasteurized milk was then homogenized to break down the size of the butterfat globules from 8 to 10 microns to 2 microns or less in size. To accomplish this, the pasteurized milk was forced under pressure up to 2,500 lbs per sq. in. through a series of very small openings which caused a shearing action that broke up the butterfat globules. By increasing the number of globules and reducing their size, the butterfat can be mixed uniformly through the product so that the cream in the product does not rise to the surface (Tise Test. pp. 5786, 5823-26).

(g) After the milk was homogenized, it was fortified with Vitamin D concentrate with 400 USP units added per quart. It was then pumped to the pasteurized side of the regenerator where it was used to heat the cold raw milk, it was cooled and then pumped into a cooling section where it was cooled to 40° F. From this point, it passed through a series of pasteurized storage tanks ranging in size from 10,000 to 25,000 gallons and it was then ready for packaging (Tise Test. pp. 5785-90).

398. When raw milk is pasteurized, homogenized and fortified with Vitamin D as it was at Borden's Woodstock plant during the period 1965-1970, it is modified and/or changed in a number of ways which produce the following biological, chemical and physical changes in the raw milk:

(1) Biological changes:

(i) In the pasteurization process, every particle of the raw milk is subject to temperatures of 143° F. for 30 minutes or, as an alternative method, the raw milk is heated to 160° F. for at least 15 seconds. Pasteurization of milk, mandatory in all but two states where milk is sold to the public, is necessary to prevent infections such as bovine tuberculosis and human diseases such as typhoid fever, undulant fever, scarlet fever, diptheria and strep throat (Graham Tr. pp. 6280-87; 6299-6300, 6311).*

(ii) When raw milk is pasteurized, biological changes result from the destruction or killing of microorganisms that can and have caused serious diseases resulting from drinking raw milk (Graham Tr., 6280-87; 6299-6300, 6311).

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* In 1923, the U.S. Public Health Service determined that raw milk could not be safely sold to the public and it promoted the adoption of what is today referred to as "The Pasteurized Milk Ordinance" which specifies sanitation procedures to be followed in the handling of milk, the type of equipment to be used in handling and processing raw milk to prevent milk-borne diseases and the necessity of pasteurization (Graham Tr. pp. 6280-87).

(2) Chemical changes:

(i) Pasteurization also destroys certain enzymes which are naturally present in milk including lipase and others which are capable of spoiling milk. Lipase is a complex molecule that digests or destroys fat in raw milk thereby releasing fatty acids which cause milk to become rancid, producing an objectionable odor and taste within 24 to 48 hours. The destruction of lipase extends the shelf life of fluid milk making it possible to sell it to the general public. In addition to the destruction of enzymes, pasteurization also removes esthetically undesirable material present in raw milk secreted by cows and makes it more commercially saleable (Graham Tr. 6278-80, 6292-93, 6312).

(ii) A chemical change also occurs in raw milk when, after pasteurization and homogenization, it is fortified with Vitamin D concentrate under controlled conditions. The fortification of milk with Vitamin D increases the nutritional value of milk and has all but eliminated rickets in children in the United States. (Graham Tr. 6301-10).*

In order to assure the dispersion and uniform mixing of Vitamin D throughout the product, vigorous agitation at the time it is added is necessary to create a stable emulsion so that the product will not separate during storage and distribution. Homogenization accomplishes this by rupturing the fat globules, shredding or decreasing their size, creating a situation where the fat globules will no longer float to the top of the product. Without homogenization, the Vitamin D would be concentrated in the cream layer that separates from the fluid milk which would result in the cream layer containing more than the recommended level of Vitamin D and the skim milk part to the milk would not have the level recommended for the prevention of rickets.

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* The fortification of milk with Vitamin D was first attempted in 1949 as a means of preventing rickets which results from the body's inability to produce calcium needed to strengthen bones. After extensive research it was determined that a combination of Vitamin D and calcium and phosphorus, the last two being found in milk, could prevent rickets, which causes bowed legs and enlarged knee joints (Graham Tr. pp. 6301-10).

(3) Physical changes:

(i) Certain physical changes occur when milk is homogenized. First, the fat globules in milk are ruptured and reduced in size creating a stable emulsion in the product by the uniform distribution of the small fat globules. As a result, homogenized milk does not have a concentration of cream at the top of the product. Second, the color, *i.e.*, whiteness, of homogenized milk is greater than raw milk and the taste is different from raw milk. Third, there is also an unfolding or reduction of the protein molecules in milk with homogenization so that when milk coagulates in the human digestive tract, a smaller, softer curd is produced. This increases the digestibility of the curd which substantially reduces incidents of colic and digestive problems in infants (Graham Tr. 6309-12, 6317).

D. The Dairy By-Products Borden Sold to A&P Were Processed and/or Manufactured at Woodstock

399. During the period 1965-70, A&P purchased various dairy by-products from Borden under the private label arrangement. A list of those products, together with a description of the process by which they were processed and/or manufactured, is as follows:

(a) Skim milk: raw milk is sent through the separator where the skim milk is separated from the cream and its butterfat content is standardized at 0.7%. It is then fortified with Vitamins A and D and non-fat milk solids are added and it is pasteurized and processed the same as homogenized milk (Tise Tr., 5793 and RA&PX 133 and 134).

Skim milk is physically different from raw milk in that it is pasteurized, its butterfat is standardized at less than 1%, it is fortified with Vitamins A and D and non-fat milk solids are added (Graham Tr. 6312).

(b) 2% milk: this is a blend of raw whole milk and raw skim milk which is then tested and its butterfat content standardized at 2%, pasteurized and homogenized and fortified with Vitamins A and D (Tise Tr. 5792 and RA&PX 133 and 134).

2% milk is physically different from raw milk in that it is pasteurized, the butterfat content has been reduced and Vitamins A and D added. (Graham Tr. 6312).

(c) Chocolate milk: raw whole milk and raw skim milk are blended to reach the desired butterfat level of 3.7%. Then chocolate powder and sugar are added, the product is then agitated and pumped into a short time pasteurization system (143.5° F. for 30 minutes), homogenized and then cooled (Tise Tr., 5785, 5793 and RA&PX 133 and 134).

Chocolate milk is produced from pasteurized and homogenized raw milk to which additional material including chocolate, sugar and other ingredients are added to create a new mixture different in color and taste from milk (Graham Tr. 6321).

(d) Buttermilk: raw skim milk with the butterfat adjusted by adding cream and condensed skim is pasteurized by heating to 185° F. and held for 45 minutes to an hour. The product is then cooled to 72° F. and a culture of bacteria called a bulk starter is added together with salt and butter flakes and held at 78° F. for 14 to 16 hours at which time it becomes cultured buttermilk and has reached the desired flavor. It is then cooled to 40° F. (Tise Tr. 5794 and RA&PX 133).

Buttermilk is produced from raw milk which undergoes extensive heat treatment and then a bacterial culture is added to produce a product different from raw milk in viscosity and taste (Graham Tr. 6321, 23).

(e) Half & Half: this product is a blend of raw whole milk and raw cream standardized to the desired butterfat content of 11.5%. It is then pasteurized at 175° F. for 20 seconds and homogenized (Tise Tr. 5795, 5820 and RA&PX 134).

The Half & Half product is different in viscosity and taste from raw milk and is used for an entirely different purpose than fluid milk; it has also been pasteurized and homogenized (Graham Tr., 6321-22).

(f) Whipped cream: this is raw cream to which air has been added and its butterfat content standardized at 32% or more. It is pasteurized and then cooled (Tise Tr., 5795, 5820).

Whipped cream is different in taste, viscosity and is used for an entirely different purpose than raw milk or fluid milk (Graham Tr., 6321-22).

(g) Sour cream: this product is a blend of raw whole milk and raw cream to achieve the desired butterfat content. It is pasteurized at 185° F. for a minimum of 45 minutes. It is then cooled to 70° F. or 72° F., a culture of bacteria added, and incubated for 14 to 16 hours where it coagulates and develops the desired body and flavor. It is then cooled. The culture is added to develop lactic acid from the lactose in raw milk; this gives it the required body, flavor and aroma (Tise Tr., 5795-96 and RA&PX 133 and 134).

Sour cream is subject to pasteurization at high temperatures and ingredients added to create a product clearly different from raw milk in viscosity, taste and physical appearance (Graham Tr., 6321-22).

(h) Egg nog: this product is a blend of raw whole milk and raw cream to which is added sugar, egg yolk solids, corn syrup solids, flour, sucrose and stabilizers. It is then pasteurized and additional materials added including spices and rum to reach the desired flavor (Tise Tr.,5796-97; RA&PX 236, Exs. A through F).

Egg nog, a pasteurized product, is clearly different in color, viscosity, taste and appearance and is produced from raw milk to which ingredients have been added (Graham Tr.,6322, 23).

(i) Onion dip: this product is made from sour cream to which Ramsey's French Onion Dip-N-Chip base is added to reach the desired flavor (Tise Tr.,5797; RA&PX 236, Ex. G).

Onion dip is different from raw milk in its taste, appearance, viscosity and the addition of other ingredients (Graham Tr.,6323).

E. Home Pasteurization, Cost of Processing Equipment at Woodstock and Relevant Statutory Provisions of the State of Illinois and the City of Chicago

400. While disease-causing bacteria can be removed from raw milk if it is boiled immediately prior to consumption, boiling is a risky and laborious process which adversely affects the texture and taste of the milk, giving it a cooked flavor, and impairs its nutritional value because it diminishes sensitive nutrients such as Vitamins C, B-1 and B-12. It is not recommended by the U. S. Department of Agriculture (Graham Tr.,7096-98; CX 293). Proper pasteurization cannot be accomplished by heating raw milk over a

stove. Home pasteurization is not very sanitary and very impractical. As for homogenization, it would be impossible to do this at home (Graham Tr., 6286, 6292, 6298-6300; Tise Tr., 5826, 5829).

401. In 1965, Borden's Woodstock plant was the largest, most highly automated raw milk processing plant in the country (RA&PX 129, 130 and 131). As of 1974, it would cost between $4 to $5 Million Dollars to replace the equipment at Borden's Woodstock plant used to pasteurize, homogenize and fortify raw milk to produce homogenized Vitamin D milk and milk by-products (Tise Tr., 5789-92).

402. At all times during the period 1965-1970, the State of Illinois (RA&PX 53) and the City of Chicago (RA&PX 55) regulated by licensing the sale of milk and milk products for human consumption and specified the equipment to be used and the conditions under which raw milk would be handled and processed.* Some of the applicable regulations in effect during that period were the following:

(a) Milk or milk products could not be sold for human consumption through retail stores unless pasteurized (RA&PX 53, §§ 123-225 and 220.22).

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* In addition, during the same period, the City of Chicago had an ordinance which prohibited the sale of certified raw milk except by prescription or order signed by a licensed doctor. See Appendix B, p. A2, to this Volume for the relevant portions of this ordinance

(b) Pasteurization required that every particle of raw milk be heated to at least 145° F. and holding it at such temperature continuously for at least 30 minutes, or to at least 161° F. and holding it at such temperature continuously for at least 15 seconds in equipment approved by the State Department of Agriculture, and properly operated (§ 115-36).

(c) Any person operating a processing plant where milk was pasteurized had to obtain a certificate of approval from the State Department of Agriculture showing that the plant and equipment were in compliance with the applicable law (§§ 115-38, 116, 188, and 129.01).

(d) A processing plant where pasteurization occurs was required to be equipped and operated in accordance with the (a) specifications for temperature-control instruments and devices used on pasteurization equipment; (b) specifications for pasteurization by 30 minute holding method; (c) specifications for high-temperature short-time continuous flow pasteurization; (d) specifications for pasteurizers employing regenerative heating; and (e) recording-thermometer chart requirements, as prescribed in the minimum requirements (§ 129.17).

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UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

IN THE MATTER OF THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC., a corporation and BORDEN, INC., a corporation.	Docket No. 8866

RESPONDENT A&P'S PROPOSED FINDINGS OF FACT, LEGAL ARGUMENTS, CONCLUSION AND ORDER

VOLUME II

Pages 559 to 923

A&P'S COST STUDIES

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A&P PROPOSED FINDINGS OF FACT

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UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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In the Matter of :

THE GREAT ATLANTIC & PACIFIC :
TEA COMPANY, INC.,
a corporation, and :
BORDEN, INC.,
a corporation :

------------------------------------ x

DOCKET NO. 8866

TO: THE HONORABLE HARRY R. HINKES
ADMINISTRATIVE LAW JUDGE

VOLUME II

A&P'S COST STUDIES

A. INTRODUCTION

In this portion of our brief we present a review of the three cost studies presented by respondent A&P in support of A&P's contention that the prices it received were cost justified. These studies were designed to answer three questions.

1. Could Borden have been expected to enjoy a profit on its private label price proposal of September 21, 1965 to A&P (CX-62)? This study is presented in rebuttal to the so-called Malone studies (CX 54B and CX 87A-B) and other cost data (CX 21U, CX 23-25A and CX 206)

relied on by Complaint Counsel to meet their burden of proving that the Borden bid to A&P was not cost justified.

2. Did the lower costs incurred by Borden in serving A&P, when compared to the costs incurred by Borden in serving the 28 allegedly injured grocery store customers through its O'Hare branch, actually justify the lower prices Borden charged A&P?

3. Did the lower costs incurred by Borden in serving A&P, when compared to the costs incurred by Borden in serving the 8 allegedly injured grocery store customers through its Hammond Branch, actually justify the lower prices Borden charged A&P.

The prices specified in Borden's offer for private label merchandise were contingent upon A&P's acceptance of sharp reductions in the services provided by Borden and the performance by A&P of certain functions previously provided by Borden (i.e., pre-ordering of merchandise and assembly of empty cases for expeditious collection by Borden delivery drivers). The private label bid covered eleven specific items, each of which involved different prices and costs. Borden's offer contemplated A&P's satisfying the remainder of its milk and dairy requirements with purchases of Borden label products.

For internal purposes, in summarizing data for management, Borden frequently summarized cost and price date in terms of average values per point. The point had a value roughly equal to one quart of milk or milk products. For convenience in summarizing comparisons of costs and prices for different products and classes of customers, the same practice was followed by respondent A&P in its analysis of differences in Borden's prices and costs.

Respondent A&P presented three analyses of Borden's prices and costs. These analyses were summarized in:

1) RA&PX 232, which addressed itself to the first of the three questions, i.e., could Borden have expected to earn a profit on its private label price proposal to A&P (CX 62)? The study demonstrated that Borden would, in fact, have been expected to earn a substantial profit.

2) RA&PX 233, which addressed itself to the second of the three questions, i.e., were the prices charged to A&P compared to those charged to Borden's 28 allegedly injured customers served by its O'Hare Branch, cost justified or not? The study demonstrated that Borden's prices to A&P on the O'Hare routes were cost justified.

3) RA&PX 234, which addressed itself to the third of the three questions, i.e., were the prices charged to A&P compared to those charged to Borden's 8 allegedly injured customers served by its Hammond Branch, cost justified or not? The study demonstrated that Borden's prices to A&P on the Hammond routes were cost justified.

Inasmuch as Borden's offer was contingent upon A&P's acceptance of sharp reductions in marketing services provided by Borden, all three studies (RA&PX 232, 233 and 234) included an analysis of the costs affected by the contract terms.

Functions so affected were those relating to services that can generally be described as selling and delivery. More specifically, this would include functions such as truckloading, physical delivery, branch clerical, advertising, merchandising, administrative overhead, etc. The two studies for actions postdating the start of the contract, namely, RA&PX 233 and 234, are concerned with differences in the costs of serving A&P and serving allegedly injured customers, and there was no need to determine absolute levels of cost. These two studies are cost justification studies as contemplated by the Robinson-Patman Act.

In the analysis on the profit to be anticipated in the private label proposal it was necessary to determine the absolute level of cost. Accordingly, in RA&PX 232 additional functions and cost categories were analyzed to determine the total cost of the delivered product, and this study also includes the direct material, processing, trailer loading and hauling costs. This study is not an actual cost justification presentation since it does not purport to compare differences in Borden's costs of serving customers. It is presented for the principal purpose of rebutting the so-called Malone studies.

In the pages that follow we set out the details of A&P's three studies, and respond to Complaint Counsel's criticisms of them.* Our findings demonstrate, we submit, that Mr. Havemeyer's studies were soundly conceived and developed, and that they establish both that the Malone documents are unreliable and not probative and that the prices paid by A&P to Borden were cost justified.

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* Unless otherwise indicated, all references in this volume to Complaint Counsel's brief and findings are to those contained in volume II of their proposed findings of fact and conclusion of law regarding A&P's cost studies.

B. THE CASE & COMPANY ANALYSIS OF BORDEN'S RECORDS DEMONSTRATES THAT BORDEN COULD HAVE ANTICIPATED A SUBSTANTIAL PROFIT ON ITS PRIVATE LABEL PROPOSAL OF SEPTEMBER 21, 1965 TO A&P

1. Introduction

428. Mr. Havemeyer prepared RA&PX 109, which shows that Borden would have made a substantial profit on the prices proposed in its private label bid to A&P on September 21, 1965, CX 62 (Havemeyer Tr. 6956). The Borden records examined by Mr. Havemeyer in the preparation of this study are listed on RA&PX 110 (Havemeyer Tr. 6959).

429. RA&PX 109 listed the 11 items covered by Borden's final bid to A&P. It set out the sum of all of Borden's costs, through delivery, for each product. The cost of each product was then restated on a cost per point basis for each product. It also stated the unit price and the price per point for each product quoted to A&P under the September 21, 1965 bid, and the difference between price and cost, or the margin, per point, for each product. Based on the percentage of anticipated sales of each product to the total sales anticipated for all private label purchases, a weighted margin per point was then determined for each product. These weighted margins per point were then combined to obtain the anticipated margin per point on the entire transaction. From this was subtracted indirect administrative and marketing costs

per point (which were not included in the sum of all costs through delivery) to obtain the profit per point. This was divided by the average price per point to obtain a percent profit (Havemeyer Tr. 6959-62; RA&PX 109).

430. The elements that went into the determination of the total costs through delivery for each product (displayed in column B of RA&PX 109) are direct material costs, processing costs, trailer loading costs at the processing plant, hauling costs (the cost of transporting the product from the processing plant to the redistribution point), truckloading at the branch level and the delivery costs. These six items constitute Borden's entire cost of providing private label milk to A&P through delivery (Havemeyer Tr. 6964-65; RA&PX 111).

431. At the time that this study was first identified, Complaint Counsel observed that they failed to "understand the relevancy of this [study] to the Robinson-Patman portions of this case . . . . In view of the fact that there is no comparison in this with costs to other customers, there is no way to determine whether or not the price to A&P could be cost-justified as compared to prices to other customers." (Tr. 6958) We concur in this observation, at least insofar as it urges that this study of Borden's anticipated profits is not a formal cost-justification study.

432. This study, however, is not presented as a study, directed at cost justifying price differences, but simply as a response to the studies prepared by Borden's accountant, Joseph Malone, and which Complaint Counsel introduced as CX 54 ~~and 87 and~~ have heavily relied on. These Malone studies purport to show that Borden would have lost money on its private label proposal to A&P. To the extent that such evidence is relevant to these proceedings, Mr. Havemeyer's study on Borden's anticipated profit is relevant in rebuttal to those studies.

433. As stated above, however, we agree with Complaint Counsels' observation that Mr. Havemeyer's study of Borden's profits is not a cost-justification study. The question is not whether Borden expected to make money or lose money on its bid to A&P, but whether the difference in price charged A&P as against Borden's other grocery store customers was justified by differences in Borden's costs of serving A&P and those other customers. This is a proposition that cuts both ways, however, for the Malone studies also fail to compare Borden's costs of serving A&P with its costs of serving its other grocery customers. It is for this very reason that we urge that the Malone studies are irrelevant to these proceedings. They do not enable Complaint Counsel to sustain their burden under the *Automatic Canteen* case of proving that the Borden bid of September 21, 1965 to A&P was *not* cost justified.

434. All that the Malone studies purport to show, even if accepted at face value as valid cost studies, is that Borden would have lost money on its bid to A&P. All that the Havemeyer study on Borden's profitability does is to rebut the conclusions of the Malone study - it shows Borden would have enjoyed a profit. If the Malone studies are excluded as irrelevant, we would acknowledge that this study by Mr. Havemeyer on Borden's profit on its private label bid may likewise be deemed irrelevant.

2. Direct Material Costs

435. As stated by Complaint Counsel, the direct material cost represents the sum of three separate cost items - raw product cost, the cost of ingredients and the container cost (C.C. Finding 9a; RA&PX 112; Havemeyer Tr. 6966). The cost of the first two items was taken directly from CX 54B, the so-called Malone study prepared in September, 1965 (C.C. Finding 9a; RA&PX 112, Havemeyer Tr. 6967). The third item, the container cost, was taken by Mr. Havemeyer from CX 4, which is a study prepared by Haskins and Sells for Borden's Wisconsin plants.

436. Complaint Counsel have no argument with Mr. Havemeyer's determination of the first two items. They disagree with Mr. Havemeyer's use of the Haskins and Sells study, however,

to determine container costs, urging that CX 54B would have been a preferable source (C.C. Finding 9a). We note, at the outset that Complaint Counsel, although they had ample opportunity to do so, saw fit not to offer any expert testimony of their own in rebuttal to Mr. Havemeyer's expert conclusion that CX 4 was a preferable source.

437. Mr. Havemeyer explained that he used the container costs on CX 4 in preference to those appearing on CX 54B because CX 54B includes the cost of rental of the Pure-Pak machines which are the machines into which the milk containers are placed (Havemeyer Tr. 7376). The Haskins and Sells study, CX 4, stated the cost of the purchase price of a container separately from the machine rental cost (Havemeyer Tr. 7379), and Mr. Havemeyer explained that this is the preferable and more commonly followed practice (Havemeyer Tr. 7379).

438. Complaint Counsel claim that Mr. Havemeyer "was unable to cite to any evidence showing what was included in the container expense as shown in CX 4 (Tr. 7380, 7381), or the container expense as shown in CX 54B (Tr. 7376, 7377, 7464-7465)." (C.C. Finding 9a, p. 7.) The citations to which we are referred do not support their claim. At transcript pages 7380-81, we find only a statement that no part of CX 4A-E, the only part of CX 4 placed in evidence, disclosed any information concerning the costs included in "container"

costs. Mr. Havemeyer had never testified that CX 4A-E contained the information from which he determined that the container costs data on CX 4 did not include machine rental costs, and Complaint Counsel saw fit not to ask what the source of his information was. If they had asked, Complaint Counsel would have learned that this information is contained in CX 4F-Q, an affidavit by Joseph Malone, describing the Haskins and Sells study, in particular CX 4H-I, which indicates that the rental of Ex-Cell-O packaging machines was included as part of the production costs in the Haskins and Sells study (See Appendix A to this Volume II for this Malone affidavit.)*

439. The claim that Mr. Havemeyer was unable to cite to any evidence as to what Mr. Malone included in container costs in his study CX 54B, is an improper attempt by Complaint Counsel to take advantage of the fact that Mr. Malone is no longer available. As A&P counsel have repeatedly urged, Mr. Malone's so-called "cost studies" and his entire deposition testimony should not have been received in the first place, whether or not they were business records, because, by so doing A&P was deprived of a meaningful opportunity to inquire of Mr. Malone as to the details of his study. Had the complaint been promptly filed, Mr. Malone

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* The ground rules under which this case was tried provided that underlying source materials in connection with expert testimony need not be produced so long as they were made available to opposing counsel. CX 4F-Q was, in fact, produced by Complaint Counsel to counsel for A&P, as is suggested by its identification as a Commission Exhibit.

would have been alive to offer his testimony. That A&P counsel were able to cross-examine Mr. Malone at his deposition was not sufficient because that examination did not present a meaningful opportunity for confrontation of Mr. Malone. The very issue now presented by Complaint Counsel demonstrates this. Mr. Havemeyer's study had not even been commenced, let alone concluded, at the time that Mr. Malone was deposed, on February 9 and 10, 1972 (Malone Dep., CX 262).

440. In any event, contrary to Complaint Counsels' claim, Mr. Havemeyer did point to record evidence to demonstrate that Mr. Malone's study, CX 54, included machine rental costs within his calculation of container costs. He testified that Borden's chart of accounts indicates that Mr. Malone is likely to have included machine rental costs within the container costs (Havemeyer Tr. 7376). An examination of those Borden records confirms this fact. RA&PX 68 states that location 703 relates to Woodstock. The chart of accounts, RA&PX 67, has an entry for Woodstock container expense (Location 703, account 41). One of the details in that container expense account is identified as "machine leases" (Location 703, account 41, detail 400 on RA&PX 67). A debit entry of $2,944.05 in fact appears in the Borden ledgers in the 703-41 container expense account in the line entitled 703-41.400 (RA&PX 71, location 703-41). Moreover, Borden in its report to A&P on its cost calculations, stated:

> "In this regard, it is important to recognize that container costs do not just represent the milk carton alone. This cost includes, in addition to the carton, the cost of the forming machine rental, production royalties, the cost of shipping cases and case container covers, . . . " (RA&PX 23G).

441. The final distortion in Complaint Counsels' review of Mr. Havemeyer's calculation of the direct material costs occurs at the end of their proposed Finding 9(a), at page 9, where they state: "This particular error affects the calculations by the following amounts:" and then set out an additional cost for each of the eleven items included in the private label program.* In preparing this calculation they have completely ignored Mr. Havemeyer's testimony that he included the machine rental costs in the processing costs (Havemeyer Tr. 7379). The machine rental costs have, thus, not disappeared from Mr. Havemeyer's study of Borden's potential profit as Complaint Counsel would infer and do not constitute an expense additional to those he calculated.

442. The direct material costs incurred by Borden are, therefore, those set out in RA&PX 232, page 4. An experienced cost accountant, with extensive experience in the dairy industry, has so testified. There is firm support for

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* Complaint Counsel do not explain how they obtained these "additional costs" for direct material costs, but if the container costs for each of the items on CX 54B are compared with those on CX 4, the "additional cost" would be found to be the difference between the figures on the two exhibits.

his conclusions in the record, and Complaint Counsel have offered no testimony in rebuttal to those conclusions. The direct material costs determined by Mr. Havemeyer as set out on RA&RX 232, page 4 should be accepted.

3. Processing Costs

443. The procedure followed by Mr. Havemeyer in calculating the processing costs is set out in a flow chart prepared by Mr. Havemeyer and received as RA&PX 114 (Havemeyer Tr. 6968). The processing costs consist of all the costs of operating the plant and include such expenses as labor, ownership, rental, equipment, supplies and utilities (Havemeyer Tr. 6968-69).

444. In determining the processing costs at Woodstock, Mr. Havemeyer began with the number of units of each product produced at Woodstock in May, 1965. He then determined a unit cost from the Haskins & Sells study of Borden's Milwaukee* operations (CX 4). Multiplying the Milwaukee unit costs by the units produced at Woodstock, he calculated the total expense that Woodstock would have incurred in producing each product had it experienced Milwaukee unit costs (RA&PX 234, pp. 10-12, 21). Mr. Havemeyer then adjusted the costs he had derived from the Haskins & Sells study to account for the fact that Woodstock's labor costs were higher than Wisconsin's while its non-labor costs were lower (Havemeyer Tr. 6990, 6998-99). To do so he had to break the production expense into three components, labor

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* The Haskins & Sells study actually calculated costs for Borden plants at Milwaukee and Madison, Wisconsin. The study was usually referred to in the proceedings as the Milwaukee study, and that term will be used here for convenience.

costs, Ex-Cell-O machine rental costs and all other costs (Havemeyer Tr. 6984-85).

445. From the Borden accounting records, Mr. Havemeyer secured the total production expense at Woodstock in May 1965 for all products. By subtracting labor-related sub-accounts, he was able to determine that Woodstock spent $61,190.96 on all other costs.* Another Borden accounting record, RA&PX 65, shows that Borden would have expended $70,533.26 (see RA&PX 65, p. 2, line entitled "Grand Total - All products, col. "Total formula cost", sub-col "all other expense") in May 1965 at Woodstock for all other expenses, if the Wisconsin unit costs had been directly applicable at Woodstock. $61,190.96 divided by $70,533.26 equal .86755. Thus all other costs at Woodstock amount to only .86755 of those that would be obtained at Milwaukee rates. (RA&PX 232, p.13). Mr. Havemeyer therefore multiplied the Milwaukee "all other expense" costs on RA&PX 65 for each of the eleven private label products by this factor of .86755 to determine the actual amount of all other costs for each product (RA&PX 232, p. 14). To the figure thus obtained, Mr. Havemeyer added on the Ex-Cell-O machine rental costs for each product, thereby obtaining Woodstock total costs, excluding labor, for each product (RA&PX 232, p. 10)

446. The total of all other expenses actually incurred at Woodstock for each of the private label products was then subtracted

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* Ex-Cell-O machine rental costs were not included within these all other costs because Borden's accounting system treated this cost as part of container costs (A&P Finding 440).

from the total expense that Borden would have incurred for each product if Woodstock had experienced Milwaukee unit costs. The result of such a step is the calculation of Woodstock's labor expense for each product if it had experienced Milwaukee rates (RA&PX 232, p. 10). This figure was then multiplied by 143.759% to calculate the actual labor expense incurred at Woodstock (RA&PX 232, p. 10). This percentage figure had been determined by Mr. Havemeyer by dividing Woodstock's total labor expenses for May 1965 - obtained from Borden records - by the total labor expenses that Borden would have incurred at Woodstock if Woodstock's labor rates had been the same as Milwaukee's (RA&PX 232, p. 20).

447. In the above manner, Mr. Havemeyer determined the Woodstock production costs for each item included in the private label bid of September 21, 1965. They are set forth on RA&PX 234, p. 9.

448. In developing the processing costs that Borden could reasonably expect to incur at its Woodstock plant, Mr. Havemeyer, as explained above, utilized the costs that Haskins & Sells had determined in 1964 for Borden's plant operations at Milwaukee and Madison, Wisconsin (Havemeyer Tr. 6969).

449. Complaint Counsel dispute Mr. Havemeyer's selection of the Haskins & Sells study as the basis for determining Borden's processing costs. They claim that the appropriate processing costs had been calculated on CX 54B by Mr. Malone in September, 1965 for each of the items involved in the private label

arrangement. They maintain that Mr. Malone's calculation of processing costs on CX 54B is preferable to Mr. Havemeyer's calculation of those costs (C.C. Finding 9(b), pp. 9-10), and conclude that the processing costs calculated by Mr. Havemeyer for each item must be adjusted, usually upward, to reflect the differences in the processing costs as calculated by Mr. Malone and Mr. Havemeyer (C.C. Finding 9(b) (xvi), pp. 29-30).

450. Complaint Counsels' reliance on the figures on CX 54B is misguided and ignores the fact that the Woodstock plant had not been in operation for a sufficiently long period of time to have allowed Mr. Malone to have considered Borden's actual operating experience at Woodstock in determining operating costs. Mr. Havemeyer pointed out that a formal cost study of Woodstock operating expenses, of the type performed by Haskins & Sells for Borden's Wisconsin operations, had not been made in 1965 (Havemeyer Tr. 6879-80). Although he looked for such a study, he was unable to find one; instead, he found only studies that employed average costs (Havemeyer Tr. 6979). Mr. Havemeyer's inability to find any formal cost study of Woodstock operations in 1965 coupled with his uncovering of average figures, leads to the conclusion that there was no formal cost study prepared by Borden in 1965 on its Woodstock operations (Havemeyer Tr. 6980). Surely, if there had been a formal study, Borden would not have found it necessary to resort to mere average figures. The absence of such a study is, of course, understandable since

the Woodstock Plant had been on stream for only a short time by 1965 (Havemeyer Tr. 6979), and experience with its actual operations would not have been sufficient to allow a realisitic determination of its operating expenses. Moreover, Mr. Malone testified that, at the time he prepared CX 54B, he did not have available the information from which he could prepare a cost analysis based on the kind of service Borden was actually going to provide A&P (Malone Dep. 216).

451. Further confirmation of the soundness of Mr. Havemeyer's judgment that the production expenses calculated on CX 54B substantially overstated Borden's Woodstock expenses is provided by a later study prepared by Mr. Malone in June, 1966, and introduced as CX 87A-C. This later study prepared by Mr. Malone when the private label program was actually in operation gives Borden's processing costs as $.0097 per point for both Borden and private label products (CX 87A-B, line entitled "processing cost"). This production expense is substantially less than the production expense displayed on CX 54 B. Hardly a single item appearing on CX 54B has a production expense per point as low as the figure of $.0097 calculated by Mr. Malone in June, 1966 during actual operating conditions. For example, CX54B calculates the production expense for the five major items, gallons, half gallons and quarts of homogenized milk, half gallons of 2% milk and half gallons of skim milk - which together constitute 80% of Borden's expected sales to A&P pursuant to the private label arrangement (C.C. Br. 106; CX 65) - as follows:

	Per Unit	Per Point*
Gallons - homo.	$.047140	$.011785
1/2 Gal. - homo.	.022090	.011045
Quarts - homo.	.014610	.014610
1/2 Gal. - 2%	.022360	.011180
1/2 Gal. - Skim	.022600	.011300

452. It is also worthy of note that the production expense ultimately settled upon by Mr. Malone for Woodstock expense, $.0097 per point, is almost exactly the same as the figure of $.009768 per point developed by Mr. Havemeyer on the basis of the Milwaukee cost study, and before his upward adjustment to reflect different cost rates at Woodstock. (RA&PX 232, p. 10). Contrary to Complaint Counsels' assertion, therefore, that the Milwaukee costs cannot be used as a basis for determining Woodstock operating costs (C.C. Finding 9(b), pp. 9-25), the very record that they themselves are relying upon to meet their burden of proving that Borden's prices to A&P were not cost justified, RA&PX 87, apparently utilizes the Milwaukee costs.

453. In addition to its use of higher operating costs than those to be expected at Woodstock, CX 54B is also deficient because it was prepared from average costs rather than specified costs for the private label items. The studies

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* Derived by dividing per unit production expense by the equivalent number of points for each item as set out in RA&PX 66, p. 7.

that Mr. Havemeyer found in a review of Borden's records were studies which presented average costs rather than specific costs of individual items (Havemeyer Tr. 6980). Mr. Malone used average figures in his cost studies (Havemeyer Tr. 6980). Mr. Malone himself testified that the costs appearing on CX 54 were merely "general estimates of cost" of serving all customers, and were not the costs of serving A&P specifically (Malone Dep. 149-50).

454. Faced with the obvious deficiencies in CX 54B as a tool for estimating Woodstock operating costs in 1965, Mr. Havemeyer was justified in using the Milwaukee cost figures determined by a highly respected independent auditing frim, Haskins & Sells. As stated above, Mr. Malone himself apparently determined that such costs were applicable to Woodstock (A&P Finding 452).

455. Mr. Havemeyer did not content himself, however, with a simple application of the Milwaukee costs to Woodstock, like the one apparently made by Mr. Malone. He adjusted those expenses upward to reflect Woodstock labor rates, thereby increasing Borden's costs and decreasing its net profit. Whatever the merits of Complaint Counsel's objections to the data used by Mr. Havemeyer to make this upward adjustment - and we submit they are without merit - the incontestable fact remains that Mr. Havemeyer's adjustments work to the benefit of Complaint Counsels' position in these proceedings.

456. If Complaint Counsel were unsatisfied with the manner of Mr. Havemeyer's adjustments, they could have presented their own. In any event, A&P would be quite content to forego the adjustments. In such case, the processing costs developed by Mr. Havemeyer and set out on RA&PX 234, p. 9 should each be reduced to eliminate Mr. Havemeyer's upward adjustment from the costs determined by Mr. Malone in CX 87.

457. The Milwaukee unit cost per the Haskins & Sells study (CX 4) was calculated by Mr. Havemeyer as $.009768 per point (RA&PX 234, p. 10), which corresponds almost exactly with Mr. Malone's determination of $.0097 (CX 87A-B). After adjustment to reflect differences in labor costs between Woodstock and Wisconsin, and an addition to reflect Ex-Cell-O machine rental costs (as we pointed out above in connection with machine rental costs, Mr. Havemeyer added on a cost for this expense to the other production expenses he had calculated from Borden's records to reflect the fact that he had previously subtracted the machine rental cost from Borden's container expense), Mr. Havemeyer arrived at a per unit production expense of $.011160 per point (RA&PX 234, p. 10). If the Ex-Cell-O machine rental expense of $.0017 per point (RA&PX 232, p. 100) is added to Mr. Malone's production expense of $.0097 - Mr. Malone had included machine rental expense in his calculation of container costs (A&P Finding 437-40) - we can see that the comparable production

expense calculated by Mr. Malone was $.0114 per point. The production expense calculated by Mr. Havemeyer is thus $.000260 per point higher than Mr. Malone's when the two calculations are placed on a comparable basis.

458. Contrary to Complaint Counsels' proposed Finding 9(b)(xvi) (C.C. Brief, pp. 29-30), that Mr. Havemeyer's calculations require an adjustment - mostly upward - to reflect the difference between Mr. Havemeyer's allocations of processing costs and Mr. Malone's allocations on CX 54B,* if any adjustment is required in Mr. Havemeyer's determination of processing costs, it is, therefore, a slight downward adjustment of about 2.5%.

459. Although, we submit, that we have demonstrated the essential irrelevance of Complaint Counsels' objections to Mr. Havemeyer's determination of Woodstock production expenses since his calculations result in higher costs than those set out on the very exhibit on which Complaint Counsel are relying to meet their burden of proving that Borden's costs to A&P were not cost justified (CX 87), some comment is in order in response to

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* Complaint Counsel do not explain in their finding how they arrived at the differeence which they urge should be applied to adjust Mr. Havemeyer's calculation of processing costs. The differences set out on pp. 29 and 30 of their Brief can be obtained by calculating the difference between Mr. Havemeyer's calculation of production expenses for each item covered by the private label program on page 9 of RA&PX 234 and the figures for production expense on CX 54B.

their arguments that Mr. Havemeyer was either unjustified in resorting to RA&PX 65 to allocate non-labor costs or misapplied that exhibit (C.C. Finding 9(b)(vii-ix)) and that he improperly determined machine rental costs (C.C. Finding 9(b)(xii-xiv)). As has been noted, these arguments are essentially irrelevant because the document which Complaint Counsel have offered, CX 87A-C, and which they urge is informed and reliable because it was prepared by "Borden's internal accounting expert who had the necessary 'rapport' with [Borden's] records" (C.C. Brief, p. 23), arrives at a lower per unit cost for production expense than does Mr. Havemeyer.

The Propriety of Mr. Havemeyer's Use of RA&PX 65

460. Since Mr. Havemeyer's study is directed at the determination of the profit which Borden might have expected on the private label program, it was necessary for him to assign costs to individual products and packages so that he could determine the cost of processing the specific items involved in the private label program. The costs of processing individual products were not reflected in Borden's books of account. Only the total operating costs were reflected in those records (cf. account 730-40, RA&PX 71; RA&PX 32, p. 13). There were, however, materials at hand from which such an allocation of costs could be made.

461. First, there was the Haskins & Sells study (CX4) which allocated processing costs amoung products. This was helpful, but, since this study was based on Borden's Milwaukee plant, some adjustment was necessary to bring these costs in line with Woodstock total costs. The Haskins & Sells study did not break down processing costs between labor costs and non-labor costs. A more precise result would be obtained, however, by treating these two categories of costs separately since, as Mr. Havemeyer testified, Woodstock labor costs appeared to be higher than Milwaukee, whereas the non-labor costs appeared to be lower (A&P Finding 444).

462. The information which permitted an allocation of Woodstock's production expenses was found in column 5 of RA&PX 65. RA&PX 65 was used by Mr. Havemeyer solely for the purpose of allocating "all other expenses" among the different products. It was not used to determine Borden's total costs. Mr. Havemeyer did not change the amount of money actually spent at Woodstock. That came directly from Borden's records (Havemeyer Tr. 6991).

The Propriety of Using Column 5 of RA&PX 65 for Mr. Havemeyer's Purpose

463. Because of the passage of time it proved impossible to produce a witness from Borden who had sufficient knowledge and recollection to be familiar with all aspects of RA&P Ex. 65. Mr. Daube, however, testified that the document

was from Borden's Chicago files and was prepared in the ordinary course of business (Tr. 6539) and, indeed, the Administrative Law Judge commented:

> "If you want to offer the document in evidence, fine. He has identified it as a business record." (Tr. p. 6542)

464. It is also conceded that Mr. Daube identified the figures in column 1 of that exhibit as being the quantities of each product that were produced at Woodstock in May, 1965 (Daube Tr. 6545-46; Mathias Tr. 8050).

465. Mr. Daube also testified that the information in the exhibit "relates to Borden's Woodstock plant" (Daube Tr. 6544) and that the quantity figures in column 1 were multiplied by unit costs for direct labor, indirect labor, and "all other expenses" to arrive at the figures in columns 2 through 5. (Daube Tr. 6543).

466. An inspection of RA&PX 65 itself, together with a little simple arithmetic, reveals the following additional facts:

(1) In each instance the figure in column 9 is the quotient obtained by dividing the figure in column 6 by the Woodstock figure in column 1.

(2) In each instance the figure in column 6 is the sum of the figure in column 4 and the figure in column 5.

(3) In each instance the figure in column 10 is the product of the figure in column 4 and the ratio of the total of column 10 to the total of column 4.

(4) In each instance the figure in column 12 is the sum of the figure in column 10 and the figure in column 11.

(5) In each instance the figure in column 13 is the figure in column 12 divided by the Woodstock figure in column 1.

Other relevant facts are the following:

(1) Columns 2, 3, 4 and 5 appear under the heading "Total Formula Cost."

(2) Columns 10, 11 and 12 appear under the heading "Actual Costs allocated to products on Basis of Formula Costs."

467. We submit that the identification of the document as a business record and the internal evidence of the document itself, combined with the fact that the figures set out in column 1 have been identified as the Woodstock quantities, is more than enough to authenticate the remainder of the document.

468. If the author of this document was not making calculations across the sheet relating to Woodstock why did he

(1) Multiply the quantity in column 1 by unit costs to get the figures in columns 2, 3, and 4, as Mr. Daube testified was done.

(2) Divide the figure in column 6 (which was the sum of columns 4 and 5) by the Woodstock figure in column 1 to get the figure in column 9.

(3) Divide the figure in column 12 (which was the sum of columns 10 and 11, in turn derived from columns 4 and 5) by the Woodstock figure in column 1 to get column 13.

469. It is perfectly evident that in this document someone at Borden was taking Woodstock quantities, applying formula costs from some source, factoring those costs to reflect actual expense at Woodstock and obtaining a calculated Woodstock unit cost per product, which was then reflected, for some products, in CX 54B. So far as relevance, authenticity and admissibility go, it is not important where the formula costs came from ("Reuter Dairy," the Trippe Plant, etc.); the important thing is that someone at Borden was using them to calculate Woodstock costs.*

470. Another indication that the whole purpose of RA&PX 65 was to calculate Woodstock costs is the headings referred to above: "Total Formula Cost" over columns 2, 3, 4 and

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* This dispute between the parties as to the applicability of RA&PX 65 to Woodstock production costs is but another instance of the prejudice and expense suffered by A&P as a result of the delay in filing the complaint. Complaint Counsel concede that part of RA&PX 65 is in Mr. Malone's handwriting (C.C. Br. 17). If the complaint had been timely filed, Mr. Malone would have been available to explain the other entries. To reject the expert interpretation now placed on this exhibit by A&P's cost expert because of insufficient explanation of the document by Borden personnel would be to deny A&P due process.

5 and "Actual Costs allocated to products on Basis of Formula Costs" over columns 10, 11 and 12. This is a clear statement that the movement was from formula costs to actual costs -- left-to-right -- rather than the other way around. And, with respect to many of the items, we have the added confirmation that the figure finally derived in column 13 was used in CX 54B, a document established as relating to Woodstock.

471. In short, once it is established that the quantities in column 1 are Woodstock quantities, the only reasonable hypothesis is that the document was directed at calculating Woodstock costs. No other hypothesis makes any sense at all.

472. Complaint Counsel also argue that if RA&PX 65 is applicable to Woodstock, then column 13 of that document gives the total processing cost for each of the products depicted at Woodstock in May, 1965 (C.C. Finding 9(b)(ix)) and these costs should have been used by Mr. Havemeyer. Mr. Havemeyer, however, in determining the actual total Borden expenses at Woodstock for May, 1965, used the Borden expense ledger (account 730-40, RA&PX 71), surely the best and most reliable source for this information. That record showed total costs of $168,464.28. The total expense figure appearing in column 12 at the bottom of the second page of RA&PX 65 in the line entitled "Grand Total-All Points" is, on

the other hand, $177,178.98. Facing a conflict between these figures, it is obviously sounder to use the figure contained in the ledger, rather than a derivative figure contained in an analysis like that reflected in RA&PX 65. Mr. Havemeyer used RA&PX 65 only for an allocation he could not otherwise make, the allocation of "all other expenses" among products. We note that this analysis points up one of the defects in CX54B, on which Complaint Counsel so heavily rely. The processing cost figures used in CX54B do, in fact, correspond with the figures in column 13, but the total expense figures on RA&PX 65 exceed the total expense shown on Borden's ledger account for May 1965. Thus the processing cost shown on CX54B is plainly overstated.

The Ex-Cell-O Allocation

473. Complaint Counsel also dispute Mr. Havemeyer's determination of the Ex-Cell-O rental costs. They protest that Mr. Havemeyer testified that he believed his original method - which was rejected because of a lack of underlying data to support a formula for allocating such costs* - was superior. (C.C. Finding 9(b)(xiii)). This is, of course,

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* Respondent A&P contends, of course, that the formula developed and used by Case and Company in its business should have been received as a business record, despite the absence of underlying data; at the very least, it should have been received since Mr. Malone's "cost" studies were received on that basis despite the absence of underlying records.

a far cry from stating that the alternate method is inadequate for the purposes of the study.

474. Mr. Havemeyer simply divided the Pure-Pak rental cost by the number of points of products produced in Pure-Pak containers to determine a cost per point, and multiplied this per point cost by each unit produced (RA&PX 232, pp. 100-102). This method is entirely acequate for the purpose of Mr. Havemeyer's study, which is a historical study attempting to reconstruct Borden's costs years after the fact. Especially is this true, when one recognizes that only $10,480 (RA&PX 232, p. 100) was expended in Pure-Pak rental compared with a total of $168,464 in Woodstock production expenses (RA&PX 232, p. 13).

475. Complaint Counsel's criticism of Mr. Havemeyer's alternate calculation of Pure-Pak machine rental costs also misses the point of the alternate calculation. The alternate calculation was presented to demonstrate the miniscule nature of any error that might have been introduced into the final conclusions by Mr. Havemeyer's reliance on a formula that the Administrative Law Judge has held he ought not to have used. The alternate calculation serves both to corroborate Mr. Havemeyer's initial calculation, and also demonstrates, for the record, the trivial nature of Complaint Counsels' protest about Mr. Havemeyer's use of Case and Company's

formula for allocating this cost. Its purpose was to demonstrate - and we submit that it has done so - that Mr. Havemeyer's calculation of Borden's production expenses should not be rejected because of his use of Case and Company formula for allocating machine rental costs.*

476. The argument by Complaint Counsel that Mr. Havemeyer may have eliminated a portion of the Ex-Cell-O machine rental costs from his calculations [C.C. Finding 9(b)(xiv)] is perverse. They argue from the fact that Borden's comptroller, Mr. Daube, was unable to tell just what was included in this expense that Mr. Havemeyer's use of the Borden expense record was unjustified. Mr. Havemeyer, throughout his analysis, used annual figures rather than monthly figures where he deemed the monthly figures to be atypical. In the case of the machine rental costs, he used the monthly figures. His expert judgment in this regard should be accepted in the absence of any evidence to the contrary. Certainly, A&P's expert,

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* While the difference figures on RA&PX 232, pp. 100 and 101 were excluded by the Administrative Law Judge because they, perforce, involved a calculation employing both the original and alternate calculation figures, we submit that they should be received for the limited purpose of demonstrating the minimal impact on Mr. Havemeyer's ultimate calculations of this dispute about the correct method of allocating machine rental costs. Complaint Counsel, apparently, concede as much since they, too, refer to the differences in their proposed findings (C.C. Finding 9(b)(xiii)).

attempting to reconstruct Borden's expenses, nine years after the fact, is entitled to accept Borden's actual monthly expense records - his decision to do so cannot be rejected on Complaint Counsels' speculation that some expenses may not have been included in the record.

477. Mr. Havemeyer's determination of Borden's production costs at Woodstock in May, 1965, as set out on page 9 of RA&PX 232 should be accepted.

4. Trailer-Loading

478. The trailer-loading costs incurred by Borden at its Woodstock plant in May, 1965 for each size container are set out in RA&PX 234, p. 29. An explanation of the procedure followed by Mr. Havemeyer in determining trailer-loading costs and the details of his calculations will be found at pp. 28-34 of RA&PX 232.

479. From RA&PX 41, Mr. Havemeyer secured the production data for the total quantity of every item shipped from Woodstock. Another Borden record, RA&PX 78, told him the number of packages of each size container that fit into a case. He, thus, simply divided the quantity of each item shipped by the number of packages per case to determine the number of cases shipped. (Havemeyer Tr. 7003). He then determined the number of pallets shipped on the basis of Mr. Pergler's testimony that there were 36 cases of glass products per pallet

and 30 cases of all other products per pallet (Pergler Tr. 5632; RA&PX 232, p. 34). From another Borden accounting record, account 703-37 (RA&PX 71), which the chart of accounts (RA&PX 67) identifies as Woodstock "loading expense" [C.C. Finding 9(c)], Mr. Havemeyer was able to obtain the total amount of money spent by Borden at Woodstock in May, 1965 on the loading function (Havemeyer Tr. 7520). By dividing the dollars spent by Borden at Woodstock by the number of pallets he determined a cost per pallet (RA&PX 232, p. 33). This was in turn divided by the number of cases on a pallet to determine the loading costs per case. Mr. Havemeyer determined a cost per case because in the trailer-loading function it is cases that are handled and not individual containers. Having determined the cost per case, he then divided that cost by the number of packages of each item in a case to obtain the trailer loading cost per item (Havemeyer 7003-04).

480. Complaint Counsel protest that Mr. Havemeyer's determination of the total truck loading expenses at Woodstock in May, 1965 was deficient because the Borden expense record from which he took this cost, account 703-037 (RA&PX 71), did not include an expense for depreciation. They claimed that this same account in March, 1966 did contain "a substantial entry for depreciation" (C.C. Finding 9(c) (ii)).

The characterization of the depreciation expense found in the March 1966 account as "substantial" is an overstatement. The amount of depreciation entered in the March, 1966 account is only $622 compared to a total truck loading expense at Woodstock reported by Borden in account 703-37 in May, 1965 of $29,237. If depreciation should have been included in Mr. Havemeyer's calculation of Borden's trailer loading costs it would increase those costs by only 2% (622 ÷ 29,237 = .02). As can be determined from a glance at Mr. Havemeyer's trailer-loading costs (RA&PX 232, p. 29), or Mr. Malone's trailer-loading costs (CX 54B), the trailer loading cost is already quite small. For example, in both Mr. Malone's and Mr. Havemeyer's calculation, this cost is only slightly more than 2 mills for a quart container. Increasing such costs by 2% would not result in any increase in the costs in the first four decimal places of Mr. Havemeyer's calculations.

481. In any event, the Borden accounting record is clear that there was no depreciation associated with trailer loading at Woodstock in May, 1965 (Havemeyer Tr. 7523). Certainly, Mr. Havemeyer is entitled to rely on this in preparing his study. It does not follow from the fact that a depreciation amount was shown in this account for March 1966 that such an expense was incurred in May 1965. Yet this is the

inference that Complaint Counsel insist we must draw. It is quite possible, of course, that depreciable equipment was owned and used by Borden in March 1966 which was not owned and used in May 1965.

482. Complaint Counsel also protest that in calculating the trailer-loading cost, Mr. Havemeyer failed to consider any "building expense which was allocable to the loading function" (C.C. Br. 34). They fail to cite to any record evidence to support this proposition because there is none. Complaint Counsel saw fit not to examine Mr. Havemeyer about this point (cf. Tr. 7504-7526). In any event, the record in clear that Mr. Havemeyer did not independently determine Borden's trailer loading expense at Woodstock in May, 1965. He accepted Borden's own records. No more can be required of a buyer presenting a cost study in a Robinson-Patman case.

483. Complaint Counsel also object to Mr. Havemeyer's method of determining the number of pallets shipped from Woodstock. His reliance on Mr. Pergler's testimony, they claim, involves the assumption that only full pallets of each item were shipped (C.C. Br. 36). Their objection is absurd. Mr. Havemeyer never made any such claim.

484. Obviously, pallets might contain cases of different products, but this would make no difference in the loading cost per

pallet. (Havemeyer Tr. 7514-17). Complaint Counsel are either confused or are deliberately attempting to confuse the record by claiming that "there would be some additional expense involved in mixing product on a pallet to make full pallets in such cases" (C.C. Br. 37). While there may be some additional expense incurred in loading pallets containing cases of different products as opposed to loading pallets with only a single product, this additional expense would, in any event, be miniscule (Havemeyer Tr. 7515-17). But we are not talking about such "additional expenses" in this computation of the trailer loading costs. Mr. Havemeyer began his calculation of this item of cost with the Borden record 703-037 (RA&PX 71), which gave Borden's total trailer loading expense. If it is more expensive to load mixed pallets than pallets which contain cases of different products, such "additional expense" is included in account 703-037, which gives Borden's view of what its total expenses were for the trailer loading function at Woodstock in May 1965.*

485. Complaint Counsel also complain about Mr. Havemeyer's estimation of the number of cases contained on pallets of

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* Complaint Counsel may actually be referring at this point in their brief to their argument that it *may* have cost Borden more money to load pallets for A&P than for its other customers because A&P was receiving two brands of milk. This argument, however, is also without merit (see A&P Finding 521, *infra*).

bulk items (C.C. Br. 37). They claim that he has not demonstrated sufficient exerptise to allow him to make such an estimate. They are wrong. Mr. Havemeyer's entire professional career has been associated with dairy industry cost accounting techniques. He is well qualified to offer such professional judgments as the one involved here. We note, moreover, that Complaint Counsel saw fit, on their cross-examination of Mr. Havemeyer, to forego inquiry into this area. Nor did they offer any rebuttal evidence on this question. Since there was no rebuttal evidence on this topic, and since Complaint Counsel failed to demonstrate any even arguable deficiencies in Mr. Havemeyer's estimation of the cases contained on pallets of bulk items during cross examination, Mr. Havemeyer's professional judgment on this matter remains both uncontradicted and unimpeached.

486. Finally, Complaint Counsel advance the Malone so-called "cost study" in opposition to Mr. Havemeyer's figures. Mr. Havemeyer had pointed out in his testimony that it would not be appropriate to use the unit cost set out in CX 54B (Havemeyer Tr. 8160). He explained that it is obvious from an examination of Mr. Malone's study that Mr. Malone determined expenses for the functions identified in his study as "trailer-loading", "truck-loading", "delivery, man" and "delivery, truck" on a simple per point basis without any

consideration of the costs involved in performing these functions for individual products, i.e., the half-gallon cost is half the gallon cost, and the quart cost is half the half-gallon cost in Mr. Malone's study (Havemeyer Tr. 8160-61). Mr. Havemeyer also noted that in Mr. Malone's study (Havemeyer Tr. 8161), Borden's costs of each of the four functions are the same for glass gallons as they are for paper gallons. As Mr. Havemeyer noted, therefore, Mr. Malone's work was based on extensive averaging and, consequently, he failed to take account of significant differences in the cost of handling different products (Havemeyer 8160-61).

487. Only four gallons of glass are packed in a case, whereas six paper gallons are packed in a single case (RA&PX 78). An analysis, such as Mr. Malone's which contents itself with average figures per point is simply not appropriate under such conditions. Complaint Counsel seem to grudgingly recognize some validity in Mr. Havemeyer's criticism that it does not cost as much to load paper gallons as it does to load glass gallons. They attempt to excuse this deficiency in the Malone study by arguing that there were also more cases of glass gallons on the pallet and state "although this does not quite equalize the number of units per pallet, there may have been other economies involved in loading the glass gallon pallets of which Mr. Malone was aware" (C.C. Br. 35, fn. 21).

Complaint Counsel overlook the fact that it is they who are relying on the Malone study, not A&P. They cannot meet their burden, we submit, by idle speculation on what Mr. Malone may have done. Moreover, the exact correspondence of the glass gallon and paper gallon figures on CX54B make it clear that Mr. Malone engaged in no balancing of economies; it is most improbable that different economies on each package would exactly balance. He obviously treated the packages the same without taking account of the handling differences between them.

488. Complaint Counsel's bold assertion that there is no basis for Mr. Havemeyer's testimony that Mr. Malone used average figures in his determination of costs in CX54B (C.C. Br. 35, fn. 21) is simply incredible. The most casual glance at Mr. Malone's figures will demonstrate the truth of what Mr. Havemeyer said. As pointed out above (A&P Finding 486), CX54B reveals on its face that Mr. Malone determined costs on a simple per point basis. Each expense function was allocated to each item on the basis of the number of points contained in that item.

489. Significant errors, resulting in the overstatement of costs applicable to the private label items, were the consequence of Mr. Malone's averaging approach in his studies. While averaging does have a place in statistical analyses, the injudicious use of averages can lead to meaningless conclusions. Such is the result in the case of CX54B.

490. In addition to Mr. Malone's substantial understatement of the trailer-loading expense for glass gallons [.009120 compared to .011193 determined by Mr. Havemeyer (RA&PX 232, p. 29)], a similar error can be observed in his calculation of the trailer loading cost for half & half in paper pints. Mr. Malone determined the cost of trailer loading to be $.002280 per unit of this item. This is the same cost he claims was incurred to load quart packages. Pints of half & half and quart packages of milk are given a value of one in the Borden accounting system (RA&PX 66, p. 7). Since he is assigning all costs on a simple per point basis, Mr. Malone has, therefore, assigned these disparate products the same trailer-loading costs. One does not have to be a cost accountant to recognize that Mr. Malone's conclusion is absurd. There are quite obviously twice as many pint containers in a case as there are quart containers. The cost of loading a pint container is therefore clearly only about half the cost of loading a quart container.

491. The consequence of Mr. Malone's analysis therefore is, without doubt, to overstate the trailer-loading costs for half & half. He compounds this problem by understating the costs of loading glass gallons, whcih were not included in the final private label bid. If Mr. Malone has allocated too little of Borden's trailer loading cost to the glass gallons, he has allocated too much to the paper containers.

492. Moreover, it is abundantly clear from Mr. Malone's own testimony that the calculations appearing on CX 54B did not reflect a detailed cost accounting approach (Malone Dep. 213). Borden did not maintain cost accounting records on a product and container basis (Malone Dep. 212). Mr. Malone testified that the costs appearing on CX 54B were estimates, not actual costs obtained from any cost accounting records that Borden maintained (Malone Dep. 149). Furthermore, these costs estimates relate to the functions that were incurred in serving all wholesale customers; they are not directed specifically to A&P (Malone Dep. 149-50).

493. It is apparent therefore, that Mr. Havemeyer's detailed and careful determination of trailer-loading costs are reliable. They are far preferable to the ones estimated by Mr. Malone on CX 54B. Mr. Havemeyer's calculation of the costs incurred by Borden in Woodstock in May, 1965 for the trailer-loading function should be accepted.

5. Hauling to Redistribution Points

494. The hauling costs incurred by Borden in transporting each item from its Woodstock plant to its distribution or branch locations is set out on RA&PX 232, p. 36.

The methodology and details of that calculation will be found on pages 35 through 39 of RA&PX 232.

495. RA&PX 118 was prepared by Mr. Havemeyer and explains in graphical form the manner in which he determined the cost of hauling each item from Woodstock to a redistribution point. (Havemeyer Tr. 7005).

496. The underlying statistics developed in connection with his calculation of the trailer-loading costs for the number of cases loaded and shipped (see A&P Findings 478-93) is also applicable in the determination of the hauling costs. Not all of the cases, however, were hauled to redistribution points. Some were sent elsewhere on trailer runs. Thus, Mr. Havemeyer subtracted the number of cases that were not shipped to redistribution points from the total number of cases shipped to obtain the number of cases to be associated with Borden's hauling expenses to branches (Havemeyer Tr. 7005-06).

497. From Borden accounting records, he determined the cost of owning and operating tractor trailers and

contracing with private haulers to transport Borden's goods from the plant to the branch and divided that expense by the number of cases hauled to the branch to determine the hauling cost per case. He divided this figure by the number of containers in the case to obtain the hauling cost for each item (Havemeyer Tr. 7006).

498. Complaint Counsel protest Mr. Havemeyer's decision to exclude certain expenses entered in Borden's records under June dates in connection with the hauling account. They claim this decision is inconsistent with the instances in which he accepted the Borden records, including the June expenses. Mr. Havemeyer pointed out that it was not he who determined to deduct the June expenses from the Borden records, but that this deduction already appeared on the Borden records (Havemeyer Tr. 7605). In any event, it should be noted that the amount in dispute is $3,824 (C.C. Br. 38) out of $72,829 (RA&PX 232, p. 39). If this $3,824 item should be included within the hauling expense, it would only require a 5% increase in Mr. Havemeyer's hauling cost calculations.

499. Complaint Counsel claim that Mr. Malone did not separately calculate a cost for the hauling function. They urge that "Mr. Malone prepared CX 54B to determine only the direct costs in Borden's dealings with A&P. . . . Therefore, it was not his purpose to include all costs involved in Borden's operations" (C.C. Br. 40, fn. 24). This argument is wholly unsound. The cost of hauling a product from the plant to the redistribution branch is as much a direct expense as the container, production, trailer-loading, truckloading and delivery costs derived by Mr. Malone. Complaint Counsel, however, were apparently embarrassed by what they thought was an "omission" (C.C. Br. 40, fn. 29) from Mr. Malone's study of a clearly applicable expense item. In fact, however, Mr. Malone did take this item into account. Mr. Malone included the hauling costs within his calculation of raw milk costs (CX 54B, line "add: hauling to city").

500. Mr. Havemeyer's calculations of the hauling costs are reliable. They should be accepted.

6. Truck Loading

501. The truck loading costs incurred by Borden in loading delivery trucks at the redistribution or branch level with A&P private label products is set out on RA&PX

232, page 74. The methodology and details involved in the calculation of these costs for each private label item will be found on pages 40 through 74 of RA&PX 232.

502. RA&PX 120 is a flow chart prepared by Mr. Havemeyer which explains the manner in which he determined the truck loading costs for the private label products (Havemeyer Tr. 7009). Mr. Havemeyer selected the O'Hare branch for study because information was available on that branch in the detail needed to perform the analysis (Havemeyer Tr. 7009).

503. From the O'Hare sales data for May 1965, Mr. Havemeyer determined the quantity of product sold at that branch (Havemeyer Tr. 7009-10). He had previously determined the average points per case shipped from Woodstock in May 1965 (Havemeyer Tr. 7010, 7545). He then divided the points sold at O'Hare by this average points per case value to determine that 206,921 cases would be required to hold the volume of sales credited to O'Hare (Havemeyer Tr. 7010; RA&PX 232, p. 43).

504. From the 206,921 cases thus determined, Mr. Havemeyer subtracted 44,053 cases which represents the number of cases required to hold counter sales (Havemeyer Tr. 7010; RA&PX 232, p. 43). These counter sales were subtracted

from the total cases because, while these sales were entered on O'Hare's books, they were not physically handled through O'Hare (Havemeyer Tr. 7010). Borden's branch manager at O'Hare, Joseph Pergler testified that from 99.5 to 99.8% of all counter sales were accounted for by sales to the Navy at the Great Lakes Training Station (Pergler Tr. 5693). As Mr. Pergler explained, the Woodstock plant made deliveries to the Great Lakes Training Station directly from its plant. Since Woodstock was a processing plant, however, it had no convenient method of accounting for the sales. Thus, they were carried on O'Hare's books (Pergler Tr. 5631-32).

505. From Borden's accounting record for O'Hare loading expense, account 723-37 (RA&PX 71), Mr. Havemeyer obtained the amount of money spent for the loading function at O'Hare in 1965 (Havemeyer Tr. 7010; RA&PX 232, p. 44). Dividing the amount of money spent by Borden by the number of cases actually loaded on trucks at O'Hare, Mr. Havemeyer determined a truck loading cost per case (Havemeyer Tr. 7010; RA&PX 232, p. 44).

506. From an analysis of the route books, Mr. Havemeyer determined the average points of each product that would be contained in a loaded case (Havemeyer Tr. 7010; RA&PX

232, p. 45). Full cases do not always go on trucks. Therefore, Mr. Havemeyer did not assume that only full cases were handled. Instead, he made an analysis of the Borden route books to determine how many average points would actually be found in the cases loaded onto Borden's trucks (Havemeyer Tr. 7010-7011). In making this determination Mr. Havemeyer relied on his experience. He explained that, under normal practice in the dairy industry, whenever a case of any particular product is incomplete, a second product, whose carton has the same dimensions, would be used to fill that case, so far as possible (Havemeyer Tr. 7011; RA&PX 232, p. 45). On the basis of the route books and his own informed judgment Mr. Havemeyer estimated the average points per case.

507. Having determined a truck loading cost per case and having determined, from his analysis of the route books, the average points of each of the eleven private label items that would be found in a loaded case, Mr. Havemeyer was, of course, able to determine the truck loading cost per point for each private label item by dividing the cost per case by the points per case (Havemeyer Tr. 7012, 7014; RA&PX 232, p. 74).

508. Complaint Counsel protest that Mr. Havemeyer's acceptance of the Borden O'Hare truck loading expense ledger, account 723-37 (RA&PX 71), is not justified because he

"has not determined the typicalness of substantial credits in this account, nor allocated any building expense to this function. Nor has he allocated to this function other obviously related expenses such as storage and labor supervision" (C.C. Finding 9(e)(i)).

509. The credits which Complaint Counsel consider "substantial" amount to $998 out of a total net expense in the Borden account of $18,731 (RA&PX 71, account 723-37; Havemeyer Tr. 7561). An examination of the account ledger itself will reveal that almost the entire amount of this account expenditure was incurred by Borden for wages and employee related expenses. It is especially proper, we submit, in calculating any cost, the bulk of which is composed of labor expenses, to use the actual expense figures for the period involved instead of some average figure. Presumably, if the volume or nature of the goods handled in [illegible] period under investigation differs somewhat from that encountered in a more usual period, this difference will be directly reflected in different labor expenses. Therefore, actual costs will be more accurately determined, whatever the conditions in the period under investigation, by using actual costs when those costs are primarily labor costs. The $988 credit involved, here, incidentally, is a

labor transfer (Account 723-37, RA&PX 71). In any event, if the credit were not subtracted (which, of course, is contrary to what Borden did in the account) the net expenditure of Borden for the truck loading function would increase by only 5%.

510. No building expense was allocated to the truck loading function because the Borden Company did not do so in its accounting records (Havemeyer Tr. 7563). While it might be appropriate to allocate a portion of the building expense to the loading expense function, although very few accounting analyses go into that degree of refinement, the only portion of the building associated with the loading function is the platform loading space, which is only a small part of the plant's total area (Havemeyer Tr. 7563). The total expense entered in the Borden account for the O'Hare building expense for May 1965 was only $3,135 (Account 723-8, RA&PX 71). Since only a small part of the building expense would thus be associated with the truck loading function, and since the total truck loading expenditure is almost $19,000, the addition of an expense item for building expense, even when added to the credit of $998 discussed above, would have no significant impact on Mr. Havemeyer's conclusion.

511. Complaint Counsel's allegation that Mr. Havemeyer has failed to include related expense such as storage and

labor supervision is unsupported by the record. We note that they posed a question to Mr. Havemeyer in connection with storage but withdrew the question and did not pursue the matter further (Tr. 7564). There was no cross-examination of Mr. Havemeyer about labor supervision expense. In any event, there is no reason, and certainly no record basis, to suppose that the appropriate amount of supervisory expenses were not included in the Borden expense ledger. Complaint Counsel's reference to Account 723-4 (C.C. Br. 41) is baffling. This ledger is identified in the Borden chart of accounts (RA&PX 67) as referring to office expense. It does not include storage or labor supervision.

512. Complaint Counsel object that Mr. Havemeyer's determination of the number of cases loaded at O'Hare is deficient for several additional reasons (C.C. Finding 9(e)(ii-vi)). In particular, they claim that there is insufficient foundation for his estimation of the average points per case shipped from Woodstock (C.C. Finding 9(e)(iii)). They object to his determination of the number of cases involved in counter sales (C.C. Finding 9(e)(iv)). They claim that he did not study possible cost differences between loading regular wholesale items and bulk items (C.C. Finding 9(e)(v)). Finally, they object that Mr. Havemeyer has not considered the mixing of products on pallets shipped to A&P in his

calculations (C.C. Finding 9(e)(vi)). All of their objections are both trivial and without merit.

513. Complaint Counsel's objection to Mr. Havemeyer's determination of the average points per case shipped from Woodstock repeats their objections in Findings 9(c)(v) and 9(d)(iii). In these findings, Complaint Counsel had argued that Mr. Havemeyer's calculation of the points per case was based on the assumption that full pallets of each item were shipped from Woodstock. As we pointed out, Mr. Havemeyer never made any such claim (A&P Findings 483-84). They protest again that Mr. Havemeyer's estimation of the number of cases contained in a pallet of bulk items is without foundation. We repeat again that Mr. Havemeyer's professional expertise more than qualifies him to make such a determination (A&P Finding 485). They add to their earlier catalogue of complaints, the allegation that a number of bulk items are not listed in the supporting Borden record from which the point values were derived (C.C. Br. 44). As Mr. Havemeyer explained in his testimony, the point values he used are those set out on page 7 of RA&PX 66. He extended the point values shown on that page for the smaller packages to get point values for the larger packages (Havemeyer Tr. 7547-49).

514. Complaint Counsel's argument about the manner in which Mr. Havemeyer determined the number of cases involved in counter sales is an exercise in trivia. They protest that it is important to know whether the items shipped as counter sales to the Great Lakes Naval Training Station were "bulk items, regular items or a mixture of both" (C.C. Br. 44). The trivial nature of this objection can be seen from an examination of RA&PX 232, pages 42-44, in which the development of the counter sales data and their application to Mr. Havemeyer's other calculations is set out.

515. On page 43 of RA&PX 232, we see that Mr. Havemeyer determined the cases actually loaded onto trucks at O'Hare by subtracting the cases connected with the counter sales from the total credited to the O'Hare account. The number of cases involved is 44,053.

516. Mr. Havemeyer's estimate of the volume of counter sale cases delivered directly to the Great Lakes Naval Station is contained on page 42 of RA&PX 232. He made this estimate by first substracting from the total volume produced at Woodstock those bulk items which he deemed would not be significant in counter sales. He then determined the points per case for all items, excluding bulk items. He then used the figure which he thus obtained, 22.248 points per case, to divide into the total counter sales,expressed in points in Borden's accounting records,

to arrive at an estimate of 44,053 for the number of cases shipped to the Great Lakes Naval Station (RA&PX 232, p. 42).

517. If Mr. Havemeyer was wrong in his judgment as to the nature of the items shipped by Borden to the Great Lakes Naval Station, there are several possibilities for the appropriate value to be used for the average counter sale points per case shipped from Woodstock. If no bulk items were shipped then the value of 22.248 used by Mr. Havemeyer was correct. If all bulk items were shipped, the average points per case would have been 24.734 [1,040,950 ÷ 42,085 (RA&PX 232, p. 42)]. If counter sale shipments to the Great Lakes Naval Station were a mixture of bulk and non-bulk items, the average points per case would be between these two values. For example, if counter sales were made up of the same proportion of bulk and non-bulk items as Woodstock's total production, the figure would be 22.431 (RA&PX 232, p. 43). Thus, whether the items shipped to the Great Lakes Naval Station were "bulk items, regular items or a mixture of both" (C.C. Br. 44), the average points per case for the counter sales would vary between a low of 22.248 and a high of 24.734. Whichever figure is used, makes no significant difference in the ultimate calculation of loading costs. Any any slight difference that might result would only serve to decrease Borden's cost, in further support of

A&P's position that Borden would have enjoyed a substantial profit on its private label sales to A&P.

518. For example, if the total counter sale points are divided by the average figure of 22.431 for all Woodstock production, one will obtain 43,695 as the estimated cases shipped to the Great Lakes Naval Station as opposed to the 44,053 derived by Mr. Havemeyer (RA&PX 232, p. 42). If this new figure of counter sale cases is subtracted from the total cases charged to O'Hare, 206,921 (RA&PX 232, p. 43), one would determine that there were 163,226 cases loaded onto trucks at O'Hare as opposed to the 162,868 calculated by Mr. Havemeyer (RA&PX 232, p. 43). The number of cases loaded onto trucks at O'Hare was used for the purpose of dividing the total expenses at O'Hare to obtain a truck loading cost per case. If the cases loaded at O'Hare were actually 163,226, therefore, the loading cost per case would be $.1149 ($18,731.48 ÷ 163,226) compared to the cost of $.115010 calculated by Mr. Havemeyer (RA&PX 232, p. 44). This is a change of one one-hundredth of a cent. This figure is in turn to be divided by the average points per loaded case for each product (RA&PX 232, p. 74). As the lowest number of private label points per case is 15.33 (RA&PX 232, p. 74), in the case of the skim half gallon, the discrepancy will be less than one fifteenth of a hundredth of a cent per point, or $.000006.

519. Finally, of course, this discrepancy would serve to decrease the loading cost, not increase it. If the highest possibility had been used, this discrepancy would be somewhat greater, of course, but this would only serve to further decrease the truck loading cost. It is, therefore, clear that the question of the nature of the counter sales is totally without significance and not "substantial", as Complaint Counsel claim (C.C. Br. 44). Their behavior in this regard is, we submit, unfortunately, typical of their response to Mr. Havemeyer's cost analyses and reflects their complete disregard for the teachings of the cases as to the standards to which a party presenting a cost justification is to be held.

520. Complaint Counsel also protest that Mr. Havemeyer did not study possible cost differences in loading regular wholesale items and bulk items (C.C. Br. 44-45). They claim that this is "a serious defect in his studies" (C.C. Br. 45). They offer nothing but the rankest speculation that it might have cost Borden less to load bulk items than regular wholesale items. They seem to feel that because there were so few bulk items in a case as compared to regular wholesale items, that this should result in a lower cost per case of loading bulk items. They do not explain

why this should be so, and, indeed we find it hard to understand why it should cost more to load one case than another case. In any event, Mr. Havemeyer explained that he did not have the information that would have enabled him to break down the truck loading costs to such a fine degree (Havemeyer Tr. 7559). Mr. Havemeyer's task was to re-construct Borden's historical costs years after the fact. He did so with the data available to him. Nothing more can be asked.

521. Complaint Counsel have raised the spectre that because it was necessary to mix pallets of A&P label and Borden label together on a pallet to make up a full pallet that this would involve extra expense for Borden in providing A&P with private label products (C.C. Finding 9(vi)). Mr. Havemeyer testified that such mixing as was involved was taken into account in his calculations. He explained that it is inherent in his calculations because the same type of activity is necessary for non-private label items (Havemeyer Tr. 7568). In fact, Mr. Havemeyer explained, there is a greater chance for such mixing to occur in loading pallets of non-private label items (Havemeyer Tr. 7569). Because the private label items are the larger volume items they are likely to require less product mixing than the Borden label items, which include the smaller volume items. It should be obvious that mixing of items is more typical for small volume items (Havemeyer Tr. 7569).

522. Complaint Counsel allege that Mr. Havemeyer's study is defective in that it involves the assumption that the product mix at O'Hare was typical of the entire region. At the outset, we take exception to Complaint Counsel's citation to Mr. Havemeyer's testimony as an admission "that it is possible that [his assumption that the product mix at O'Hare was representative] is not the case" (C.C. Br. 46). Complaint Counsel have taken considerable liberty with the record in this citation. The question and answer are:

> "Q. I say 'isn't it possible'?
>
> "A. Oh, anything is possible." (Havemeyer Tr. 7557).

523. In any event, it was reasonable for Mr. Havemeyer to use the O'Hare branch in determining Borden's truck loading costs because it is far and away Borden's largest branch (Havemeyer Tr. 8154-55). Finally, it is inappropriate for Complaint Counsel to dispute Mr. Havemeyer's selection of the O'Hare branch as typical of Borden's Chicago operations because it is they who selected that branch in presenting their alleged discriminations. If it is not typical, then their entire case on Count II fails.

524. Complaint Counsel's final thrust is that the estimated average points per loaded case is based upon judgment. Of course, it is ! Mr. Havemeyer is an expert in the dairy industry and his judgment is certainly receivable in these proceedings. Complaint Counsel quarrel, in

particular, however, with only one of Mr. Havemeyer's judgments - his decision to "increase the 'average points ordered per case' on the part of the biggest volume item, the half-gallon homo.,from 23.88 to 24.0" (C.C. Br. 47). While acknowledging that "this may only slightly change the results," they alleged that "it is a deliberate misstatement of fact on a major item" (C.C. Br. 47, 48). It is obvious that the point is trivial. In any event, Complaint Counsel have apparently overlooked Mr. Havemeyer's testimony that, in reviewing the Borden route books, he found only one or two instances in the great number of days and stores reviewed in which the quantity of half-gallon deliveries was not exactly divisible by the number of units in the case (Havemeyer Tr. 8096). This was the basis for his action.

525. Mr. Havemeyer's calculations of Borden's truck loading costs are reliable. They should be accepted.

7. Delivery

526. Whatever else may be said about the evidence presented in these proceedings, one thing is clear. Borden's costs of delivering milk and dairy products to A&P was significantly lower than its cost of delivering those products to Borden's other customers. The evidence is uncontradicted that A&P received greatly reduced service

in connection with the private label program (A&P Findings 176-80, pp. 163-68, supra). The record is also clear that A&P received a higher number of points per delivery than did most of Borden's other customers. Evidence offered by Complaint Counsel (CX 4) and the testimony of Dr. Lyle Solverson at pages 1550-51 establish that delivery costs per unit delivered are lower for limited service delivery of the kind received by A&P and that the per unit costs are also lower for customers who receive higher volume deliveries.

527. RA&PX 122 is a flow chart prepared by Mr. Havemeyer which graphically details the manner in which he determined the delivery cost incurred by Borden for each of the eleven products included in the private label program (Havemeyer Tr. 7016-17).

528. The principle underlying Mr. Havemeyer's calculation of the physical delivery costs is one that is consistently used in dairy industry accounting. The principle states that the cost of making a delivery is related to the time spent in making that delivery. The time spent in making the delivery in turn depends on two major factors. The first factor is that the greater the volume delivered at any stop, the lower the delivery cost per unit. The second factor is that the time to make a delivery is related

to the type of service provided. The more service provided, the more time required to make the delivery (Havemeyer Tr. 7017; Solverson Tr. 1550-51).

529. In determining the delivery costs to A&P, Mr. Havemeyer first determined the cost of operating the route system per minute. To do this, he drew upon Borden's records of its expenses of operating the route system (Havemeyer Tr. 7017). Dividing the expenses by the number of route days -- a route day being a single route operating one day (Havemeyer Tr. 7020) -- one obtains a cost per route day. Dividing the cost per route day by the number of minutes in a route day, one obtains the cost per route minute (Havemeyer Tr. 7018).

530. From a consideration of the quantity of product delivered per delivery and the delivery conditions applicable to delivery to A&P under the private label program and by the application of appropriate time standards, it is possible to determine the minutes required to make a delivery to A&P (Havemeyer Tr. 7018; RA&PX 122). The minutes required to make a delivery are then multiplied by the cost per minute to obtain the cost per delivery (Havemeyer Tr. 7018-19; RA&PX 122). The cost per delivery is then divided by the points per delivery to obtain a cost per point of delivering milk and dairy products to A&P.

531. In their proposed findings in opposition to Mr. Havemeyer's calculation of the physical delivery costs, complaint counsel again put forward the costs calculated by Mr. Malone on CX54B as a basis for the rejection of Mr. Havemeyer's conclusions [C.C. Finding 9(f)(xvi)]. They point out that Mr. Havemeyer's calculations of the delivery costs* are less than half of the cost calculated by Mr. Malone (id.). They are correct in their observation. The question in dispute between the parties, of course, is whether Mr. Havemeyer's figures or Mr. Malone's figures are the more reliable. Whatever view one takes of Mr. Havemeyer's calculations, the record is clear, we submit, that the Malone figures are not applicable to Borden's business with A&P.

532. There is an enormous difference between the Haskins & Sells study prepared for Borden in August 1964 (CX 4) and Mr. Malone's study in 1965 in the calculation of delivery costs. Mr. Malone's study, CX 54B, calculates a delivery cost separately for men and trucks. When these two expenses are accumulated, the total delivery expense derived by Mr. Malone will be found to be $.024050 per point (CX 54). Haskins & Sells, calculating delivery expenses on a drop delivery basis, determined a cost of only $.011807 (CX 4). The Haskins & Sells figures are very close to those originally

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* These delivery costs have been excluded by order of the Administrative Law Judge.

determined by Mr. Havemeyer (RA&PX 232, p. 76), and to those presented hereafter in these findings.

533. The correspondence between Mr. Havemeyer's conclusions and the Haskins & Sells conclusion is understandable, of course, since both Mr. Havemeyer and Haskins & Sells prepared their cost estimates on the basis of limited delivery services. Mr. Malone's study, on the other hand, determined the delivery costs incurred for all wholesale customers; he did not determine Borden's costs of delivering to A&P (See A&P Finding 216-19, pp. 190-94, supra). Thus we know that the Malone calculation of the delivery expenses on CX 54B are totally without application to Borden's cost of serving A&P, since it costs so much less to provide limited service than full service (cf. RA&PX 8 and 9).

534. The costs Borden would incur for all costs (previously discussed in our Findings) except physical delivery and overhead, are calculated in RA&PX 232, and summarized for convenience in Table 1 which follows. These costs summarize all the costs heretofore developed in our findings.

Table 1

SUMMARY OF COSTS
(EXCLUDING DELIVERY AND INDIRECT ADMINISTRATIVE AND MARKETING COSTS)
BORDEN'S 11 PRIVATE LABEL ITEMS

Product & Container		Direct Material Cost $	Processing Cost $	Trailer Loading Cost $	Hauling Cost $	Truck Loading Cost $	Total
Homo. Paper	Gal.	.432568	.037854	.008955	.027082	.019788	.526247
" "	1/2Gal.	.216924	.014909	.004477	.013541	.009584	.259435
" "	Qt.	.110636	.011160	.002239	.006770	.004951	.135756
2% "	1/2Gal.	.193475	.013021	.004477	.013541	.014464	.238978
Skim "	1/2Gal.	.152480	.017063	.004477	.013541	.015002	.202563
"	Qt.	.078414	.013627	.002239	.006770	.006014	.107064
1/2 & 1/2"	Pt.	.128593	.012097	.001279	.003869	.003659	.149497
Choco. "	Qt.	.132854	.018948	.002239	.006770	.006204	.167015
B.M. "	1/2Gal.	.167332	.033919	.004477	.013541	.012408	.231677
B.M. "	Qt.	.085837	.015064	.002239	.006770	.006014	.115924
WH.CR "	1/2 Pt.	.152714	.015239	.000814	.002462	.003659	.174888

(1) Source: RA&PX 232, pp. 4, 9, 29, 36, 41, and 76

A + P Proposed Findings of Fact

535. Table 2 below sets out the margins per point that Borden would have enjoyed on its sales to A&P of each of the 11 private label items when the direct material, processing, trailer loading, hauling and truck loading costs for each of these items are deducted from their respective prices. A weighted margin per point for each of the products and Borden's margin on its total sales are also shown in the table.

TABLE-2

SUMMARY OF BORDEN COMPANY'S ANTICIPATED PROFIT MARGIN PER POINT BEFORE DELIVERY AND INDIRECT ADMINISTRATIVE AND MARKETING COSTS NOT INCLUDED IN UNIT COST CALCULATIONS FOR 11 PRIVATE LABEL ITEMS, AT PRICES PROPOSED ON 9/21/65

	A	B	C	D	E	F	G	H
PRODUCT & CONTAINER	POINTS PER UNIT	SUM OF ALL COSTS THROUGH TRUCK LOADING	A & P PVT.L. PRICE 9/21/65	COST PER POINT	PRICE PER POINT	MARGIN PER POINT	% OF TOTAL VOLUME	WEIGHTED MARGIN PER POINT
HOMO. PAPER GALLON	4	$.526247	$.6248	$.131562	$.1562	$.024638	17.03%	$.004196
" " 1/2 GAL.	2	.259435	.3124	.129718	.1562	.026482	47.58	.012600
" " QUART	1	.135756	.1712	.135756	.1712	.035444	8.79	.003116
2% " 1/2 GAL.	2	.238978	.2914	.119489	.1457	.026211	6.91	.001811
SKIM " 1/2 GAL.	2	.202563	.2834	.102632	.1417	.039068	4.26	.001664
" " QUART	1	.107064	.1447	.107064	.1447	.037636	1.76	.000662
1/2 & 1/2 PAPER PINT	1	.149497	.2447	.149497	.2447	.095203	6.60	.006283
CHOCO. PAPER QUART	1	.167015	.2157	.167015	.2157	.048685	0.76	.000370
B.M. " 1/2 GAL.	2	.231677	.3044	.115839	.1522	.036361	2.74	.000996
B.M. " QUART	1	.115924	.1567	.115924	.1567	.040776	2.31	.000942
WHIP.CR." 1/2 PINT	1	.174888	.2647	.174888	.2647	.089812	1.26	.001132
TOTAL							100.00%	.033772

A - RA&PX 66, p.7
B - See TABLE A-1
C - RA&PX 232 p. 98
D = B ÷ A
E = C ÷ A
F = E - D
G - RA&PX 232, p. 99, Column 8
H = F x G

536. The weighted margins set out in Table 2 were determined by multiplying the margin for each product by the percentage of Borden's total private label sales accounted for by sales of that product. These volume percentages are listed in Column G of the table. For example, homogenized milk in paper quarts constituted 8.79% of the anticipated private label point volume. Multiplying Borden's margin of $.035444 for this product by 8.79% equals $.003116. This, therefore, is the increment of average margin per point exclusive of delivery and overhead provided by the homogenized paper quart. When this same calculation is performed for all eleven items displayed in the table, and all increments of average margins are summarized, the result is $.033772 weighted average margin per point. This overall margin is the margin before the deduction of delivery and indirect administrative and marketing costs. The delivery costs per point calculated by Mr. Malone on CX54 amount to only $.024050 per point.* Thus even if the Malone figures for delivery expense are expected, there is a substantial margin of $.009722 left for overhead and margin. The indirect general and administrative cost applicable to Borden's delivery of private label milk and dairy products to A&P was $.0053 per point. Thus, even using

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*. Calculated by adding the expenses in the lines entitled "Delivery Men" and "Delivery Truck" in the column for honogenized paper quarts on CX54B. As can be observed from an examination of CX54B, these costs are merely applied thereafter by Mr. Malone on a per point basis to the other products (A&P Finding 486).

the delivery expense data on CX54B, we have demonstrated that Borden would have earned a profit of $.004422 per point on its sales of private label milk to A&P.

537. The methodology followed in the construction of Tables 1 and 2 differs from that employed by Mr. Malone on CX 54B. As seen in Table 1 and in the costs studies (RA&PX 232) from which it is drawn, costs of material and all of the processing functions were determined separately for each of the eleven private label items. Mr. Malone relied entirely on average costs (A&P Findings 453, 486-92).

538. To complete the calculations necessary to determine profit, it is now necessary to determine delivery costs. Again, there is a distinction in methods employed by Mr. Havemeyer and Mr. Malone in their respective calculations.

539. Mr. Malone had calculated only the average delivery cost Borden incurred for all wholesale points (A&P Findings 453, 486-92, 533). He had not calculated Borden's costs for delivery to A&P Stores (Malone Dep. 149-50). His calculations are not applicable to A&P, therefore, because there is a difference between costs per point of delivery to a specific customer and average cost per point of delivery to all customers because of differences in volume per delivery, and type of service provided (A&P Finding 528).

540. Mr. Havemeyer originally calculated the delivery costs Borden could anticipate on its private label proposal to A&P by means of Case and Company's wholesale milk delivery time standards. While the ruling of the Administrative Law Judge concerning the admissibility of the Case and Company's time standards makes it impossible to use in these Findings the calculation of delivery cost as initially presented,* there is ample evidence in the record to calculate the cost that the Borden Company could have anticipated if A&P accepted the significantly reduced delivery service which was an explicit condition of the private label price proposal (CX 62, CX 75 A-B).

541. A method of calculating the specific cost per point of the delivery function is given in the official Wisconsin Manual, RA&PX 9. This method of calculating delivery cost was published by an official agency of the State of Wisconsin, and its use in these proceedings is entirely appropriate. As the Supreme Court pointed out in *Automatic Canteen Co.* v. *FTC*, 346 U.S. 61 (1953), the Commission has maintained that "knowledge generally available to the buyer from published data or experience in the trade could be used by [a defendant buyer] to make a reasonable showing of his sellers' costs" (at 69).

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* A&P, of course, reserves its position that this evidence was improperly excluded.

542. Wisconsin is within the same region of the Borden Company as the Chicago Metropolitan area. CS 42D states that the Borden Company's Central Division includes the Chicago Metropolitan Region, the Eastern Iowa - Central Illinois Region, the Western Iowa Region and the Wisconsin Region. Since Borden found it appropriate to administer these regions as part of the same division, it is not unlikely that operating conditions within the region will be roughly comparable. It is also worth noting that Wisconsin is immediately adjacent to the area covered by the private label bid (RA&PX 101C). Indeed, Milwaukee, which is the city associated by Borden with its Wisconsin Region (CX 42B), is far closer to Borden's Zone 1, or the Chicago Metropolitan Region, than most of the other communities involved in the private label bid.

543. Moreover, the Commission's expert, Dr. Lyle Solverson, testified that the time requirements for effecting full and limited service deliveries "in Chicago would be the same as full service in Milwaukee" (Solverson Tr. 1556). Dr. Solverson's conclusion is eminently reasonable since there is no reason to believe that a dairy deliveryman would consume significantly different amounts of time in providing the same services in different communities. As Dr. Solverson said, "we are considering a defined service, [and a] defined function that will be performed. We are using a standardized unit. We are using a quart as a unit. I would expect that it would hold true for a large number of geographical areas" (Solverson Tr. 1556).

544. It is, therefore, entirely appropriate in this case to use published data from Wisconsin, especially where that data has been published by an official state milk regulatory agency for use by dairies, which they "could follow without getting in trouble with the Trade Practice Division through the resulting discounts" (Solverson Tr. 1578).

545. The total cost of a delivery as determined in the methodology of RA&PX 9, pp. 4-8, is the sum of the specific cost of the delivery plus the common cost of the delivery. The specific cost of the delivery is determined by:

a. Calculating the cost per route day. For Borden's O'Hare Branch in May, 1965, this was $84.14 (RA&PX 232, p. 78).

b. Dividing the cost per route day by 480 minutes [8 hours x 60 minutes (RA&PX 9, p. 7)], to obtain cost per minute. For Borden's O'Hare Branch in May, 1965, this value was $0.17529 ($84.14 ÷ 480).

c. Multiplying the cost per route minute by the number of serving minutes required. The number of serving minutes is determined by selecting the table of serving time standards appropriate to the type of service provided at the customer stop, and selecting the time value indicated by the volume of products delivered.

546. The number of serving minutes per stop required for grocery stores receiving full service is shown in RA&PX 9 for volume brackets up to 200 units. Full service time requirements for brackets in excess of 200 units are shown on RA&PX 8. The time requirements shown on RA&PX 8 up to the 200 volume bracket were taken from RA&PX 9. The higher brackets were estimated by Dr. Solverson by using modified drop service time as a predictor. The equation used was: Full Service Time per delivery in minutes = 2.85 x 1.35 times Modified Drop Time (RA&PX 8, p. 1). The equation states that grocery store full service requires an additional 2.85 minutes of time per stop beyond that required for modified drop service, and that the additional services provided in full service also require 35% more time per average unit delivered than would be required to deliver an equal amount of merchandise with modified drop service.

547. The serving time standards for grocery stores receiving modified drop and drop service are also set out on RA&PX 9. The full service, modified drop, and drop service time tables in RA&PX 9 and that portion of RA&PX 8 which sets out full service times requirements for deliveries of 200 units and higher are reproduced here for the court's convenience.

TABLE 1.—FULL SERVICE—SERVICE TIME PER DELIVERY

Number of units	Service time in minutes
0	1.65
1	3.00
2	3.50
3	4.00
4	4.50
5	5.00
6	5.50
7	5.75
8	6.00
9	6.50
10	6.75
11	7.00
12	7.25
13	7.50
14	7.75
15	8.00
16	8.25
17	8.50
18	8.75
19	9.00
20	9.25
21- 25	9.45
26- 30	10.45
31- 35	11.15
36- 40	12.00
41- 45	12.85
46- 50	13.65
51- 60	14.75
61- 70	16.20
71- 80	17.65
81- 90	19.10
91-100	20.60
101-110	21.88
111-120	23.13
121-130	24.38
131-140	25.60
141-150	26.63
151-160	27.75
161-170	28.88
171-180	29.80
181-190	30.60
191-200	31.40

Source: Time studies conducted by the Wisconsin State Department of Agriculture, Department of Agricultural Economics, University of Wisconsin, and cooperating dairies during 1963. This time data is only for retail food stores.

TABLE 2.—MODIFIED DROP SERVICE—SERVICE TIME PER DELIVERY

Number of units	Service time in minutes
1- 10	2.50
11- 20	3.50
21- 30	4.75
31- 40	6.00
41- 50	8.00
51- 60	9.00
61- 70	10.25
71- 80	11.50
81- 90	12.30
91-100	13.00
101-150	15.90
151- 200	19.90
201- 250	24.00
251- 300	26.00
301- 350	28.50
351- 400	30.50
401- 500	35.25
501- 600	40.50
601- 700	44.75
701- 800	48.50
801- 900	51.50
901-1000	53.50

Source: Time studies conducted by the Wisconsin State Department of Agriculture, Department of Agricultural Economics, University of Wisconsin, and cooperating dairies during 1963. This time data is only for retail food stores.

TABLE 3. - DROP SERVICE - SERVICE TIME PER STOP

Number of Units	Service time in minutes	Number of Units	Service time in minutes
50-100	5.500	801- 850	26.750
101-150	8.000	851- 900	27.750
151-200	10.250	901- 950	28.500
201-250	12.250	951-1000	29.250
251-300	14.000	1001-1100	30.500
301-350	15.500	1101-1200	32.000
351-400	17.000	1201-1300	33.750
401-450	18.250	1301-1400	35.225
451-500	19.500	1401-1500	36.500
501-550	20.750	1501-1600	37.750
551-600	22.000	1601-1700	38.500
601-650	23.000	1701-1800	39.500
651-700	24.000	1801-1900	40.000
701-750	25.250	1901-2000	40.500
751-800	26.000		

Source: Time studies conducted by the Wisconsin State Department of Agriculture, Department of Agricultural Economics, University of Wisconsin, and cooperating dairies during 1963. This time data is only for retail food stores.

Time Requirements for Full Service and Modified Drop Service - Grocery Store Wholesale Milk Delivery

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No. of Units	No. of Minutes Per Delivery (Full Service)1/	No. of Minutes Per Unit (Full Service)2/	No. of Minutes Per Delivery (Modified Drop Service)3/	No. of Minutes Per Unit (Modified Drop Service)2/
201-250	35.25	.157	24.00	.107
251-300	37.95	.138	26.00	.095
301-350	41.32	.127	28.50	.088
351-400	44.02	.117	30.50	.081
401-500	50.44	.112	35.25	.078
501-600	57.52	.105	40.50	.074
601-700	63.26	.097	44.75	.069
701-800	68.32	.091	48.50	.065
801-900	72.38	.085	51.50	.061
901-1000	75.08	.079	53.50	.056

1/ Source (brackets 1-10 through 151-200): Average time data collected from Wisconsin Dairies. Source (brackets 201-250 through 901-1000): Estimated by using Modified Drop Service Time as a predictor. The formula used was: Full Service Time per delivery in minutes = 2.85 + 1.35 times Modified Drop Time (see graph 1).

2/ No. of Minutes Per Unit = No. of Minutes Per Delivery divided by the midpoint of the bracket.

3/ Source: Average time data collected from Wisconsin Dairies.

548. The number of customers in various classification of business, served on the O'Hare regular wholesale routes in March 1965 are given on a Borden internal accounting record, RA&PX 74. The same record also further categorizes grocery store customers by average daily points per delivery. Utilizing this record as a source, Mr. Havemeyer developed the number of deliveries or stops made by the Borden driver on an average route day at O'Hare for each category of grocery store customer (RA&PX 232, p. 77). Mr. Havemeyer had also determined the number of points delivered per route day to each category of customer (RA&PX 232, p. 89, col. B). When those delivery figures are divided by the stops per route day made to each category of customer, the points per stop are developed for A&P and each category of customer (RA&PX 232, p. 89, col. D). Having determined the points per stop for A&P and each category of customer, one need only read off the serving minutes required to serve that customer from the State of Wisconsin's time standard tables. The results are set out below, with all groceries, including A&P, receiving full service (since the period under review was May 1965, A&P was still receiving full service).

Customer Class:	A Total Stops Per Week	B Stops Per Route Day	C Points Per Route Day	D Sales Points Per Stop	E Serving Minutes Per Stop	F Serving Minutes Per Day B x E
Grocery Stores						
A&P Stores	528	4.40	2211	502.5	57.52	253.088
Independent Stores						
Over 300 Pts/Stop	66	.55	243	442.1	50.44	27.742
250-299 Pts/Stop	12	.10	28	275	37.95	3.795
200-249 Pts/Stop	54	.45	101	225	34.25	15.863
150-199 Pts/Stop	102	.85	149	175	29.80	25.330
101-149 Pts/Stop	114	.95	119	125	24.38	23.161
0-100 Pts/Stop	348	2.90	145	50	13.65	39.585
Sub Total, Grocery Stores		10.20	2996			388.564*

A. RA&PX 232, p. 77
B. RA&PX 232, p. 77
C. RA&PX 232, p. 89, Column B
D. RA&PX 232, p. 89, Column E
E. Full Service Serving Minutes: 1-200 Points, RA&PX 9, p. 9, Table 1
201-1000 Points, RA&PX 8

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* The total serving minutes per route day required to serve grocery store customers is the sum of the serving minutes required for each class of customer.

549. As stated above (A&P Finding 545), the second step in determining the cost of delivery according to the procedure described in the Wisconsin Manual (RA&PX 9), is the determination of the common time. The total common time is calculated by subtracting the total number of specific serving minutes for the period from the total available route minutes. The total common time is then multiplied by the cost per minute to obtain the total common cost. The total common cost is in turn divided by the number of deliveries in the period to obtain the common cost per delivery. (RA&PX 9, p. 6).

550. The total specific serving time per drop required to serve A&P and the other grocery store customers was 388.564 minutes (A&P Finding 548). Borden's wholesale routes also served a limited number of schools, restaurants, and other non-store customers in addition to A&P and the other grocery store customers (RA&AP 74). In order to determine common time, it is, therefore, necessary to first determine the specific time required to serve those customers. These non-store customers were composed of 8 restaurants and delicatessens, 6 institutions, 3 factory cafeterias, 1 golf club and 24 schools (RA&PX 232, p. 77; RA&PX 74).

551. RA&PX 8 and 9 provide no specific serving time standards for such non-grocery store stops. RA&PX 11, however, includes, on p. 206, a table of serving time standards related to volume for "Restaurants, Full Service". A copy of this table is reproduced here for the court's convenience.

APPENDIX TABLE 4.--Wholesale Fluid Milk Delivery, Restaurant Full Service--Service Time Per Delivery

Number of Units	Service Time in Minutes
1- 5	6.37
6- 10	7.79
11- 15	8.50
16- 20	9.32
21- 30	10.47
31- 40	11.51
41- 50	13.00
51- 60	14.00
61- 70	15.00
71- 80	16.00
81- 90	17.00
91-100	18.00
101-125	19.50
126-150	21.50
151-175	23.25
176-200	25.00
201-250	27.50
251-300	30.00
301-350	32.00
351-400	34.00
401-450	36.00
451-500	37.50

Source: Time Studies Conducted by the Wisconsin State Department of Agriculture and the Department of Agricultural Economics, The University of Wisconsin, from 1963 to 1965.

552. The specific service time per average route required to service Borden's non-store customers at O'Hare may be calculated by noting that:

a. schools received an average of 369 points per delivery (RA&PX 232, p. 85).

b. the specific serving time for institutions receiving 351-400 units per delivery is 34.0 minutes (A&P Finding 551).

c. the O'Hare wholesale route served an average of 1.0 school delivery per route day [120 school stops per week divided by 120 route days per week (RA&PX 232, p. 77)]. Therefore, 34.0 minutes on the average route day was spent serving schools.

d. the average volume per delivery to non-stores other than schools was 198 points. (RA&PX 232, p. 85).

e. the specific service time for institutions receiving 176 to 200 units per delivery is 25.000 minutes.

f. the O'Hare wholesale routes served an average of .87 other non-store stops per route day, determined as follows:

Restaurants and delicatessens	48 stops per week
Institutions	36 stops per week
Factory cafeterias	15 stops per week
Golf clubs	5 stops per week
Total	104 stops per week

104 stops per week ÷ 120 route days per week = 87 stops per week RA&PX 232, p. 77).

g. the average route day therefore spent 21.75 serving minutes (.87 x 25.00) on non-stores other than schools.

h. the total serving time per route day spent on all non-store customers was thus 55.75 minutes. [34.0 (A&P Finding 552c) + 21.75 (A&P Finding 552g)].

553. The serving time per route day for grocery stores [388.564 min. (A&P Finding 548)] plus the serving time per route day for non-store customers [55.75 min. (A&P Finding 552h)] gives the total specific serving minutes per route day of 444.314.

554. The total cost of specific serving time was therefore $77.88 [444.314 minutes (A&P Finding 553) x $.17529 per minute (A&P Finding 545b)]. The total common cost per route day is then obtained by subtracting this total specific cost from the total cost per route day, $84.14 [A&P Finding 545a]. The result is a total common cost of $6.26.

555. The average wholesale route in Borden's O'Hare Branch in 1965 served 12.07 deliveries per day to all customers (RA&PX 232, p. 89, Col. A). The common cost per delivery was therefore $.518641 ($6.26 ÷ 12.07).

556. We are now in a position to calculate Borden's cost of delivery to A&P of both its Borden and private label products under the limited service conditions provided for both the private label (CX 62, 75) and the Borden label products (RA&PX 66). It is therefore necessary to consider the entire volume of products delivered to A&P stores in

calculating the cost per point which Borden would expect to incur for delivery of private label because the delivery time required per unit is dependent on the total product delivered.

557. The limited service to be provided to A&P under the provisions of the private label agreement (CX 62, 75) would correspond to drop service as defined by Dr. Solverson provided Borden undertook to make deliveries only to the receiving door of the A&P store, as authorized on CX 75A (Solverson Tr. 1558). If A&P was entitled to insist on delivery into a refrigerated storage box, then the service might be regarded as modified drop (Solverson Tr. 1559). Dr. Solverson acknowledged, on cross-examination, however, that the definition of drop service found on page 3 of the Wisconsin Manual (RA&PX 9) would allow the product to be put in a back room of the store (Solverson Tr.1584-85). He further admitted that there would not be an appreciable increase in delivery time required over that entailed in dropping the product on the dock if the product were instead moved into a storage room at the same level as the receiving dock (Solverson Tr. 1586). This requirement was, in fact, imposed by Borden if its drivers were to place the product in a storage room. As Borden expressed it, the refrigerated storage box was required to be one "that can be entered directly from a platform or ground level location and into which dairy products can be conveniently stocked." (CX 75A, ¶ 5(c), emphasis added).

558. Despite Dr. Solverson's testimony, therefore, that the delivery services to be provided A&P under the private label arrangement constituted modified drop services, as that term is used in the Wisconsin Manual (RA&PX 9) and in Dr. Solverson's chart (RA&PX 8) (Solverson Tr. 1557-58), his own testimony and the definition found on page 3 of the Wisconsin Manual indicate that A&P was, in fact, to receive only drop service.

559. This conclusion is bolstered by Mr. Pergler's testimony that Borden was able to reduce the number of regular wholesale routes at the O'Hare Branch from 20 to 13 routes after the initiation of the private label program with A&P (Pergler Tr. 5639). This is a reduction of 35% in the time required to serve all customers. Since sales to A&P on store routes operated out of Borden's O'Hare Branch were about 60% of Borden's total O'Hare store route sales [_cf_. RA&PX 233, p. 8, line 8, which states that A&P purchased 1,025,549 points (col. 1) out of total sales on the O'Hare store routes of 1,696,733 (col. 12)], and since all the other customers continued to receive full service (Pergler Tr. 5651), the reduction in the time required by Borden drivers to serve A&P was on the order of 58% (35% ÷ 60%). This substantial saving in serving time indicates that Borden provided only drop service to A&P rather than modified drop service.

560. We can confirm that such a reduction is equivalent to the receipt by A&P of only drop service delivery by comparing

the serving time required to serve A&P on the assumption that it was receiving drop service with the time required to provide it with full service. This calculation can be made as follows:

(1) Route Minutes per week = 8 Hours x 60 Min. x 6 days = 2,880.00 Min.

(2) Common min. per route per week: 6 days x 35.686 common min. per day* = 214.12 Min.

(3) Available Specific Serving time per route week [(1) - (2)] = 2,665.88 Min.

(4) Total Serving time per week [20 wholesale routes operated 5th period 1965 (RA&PX 74) x 2,665.88 min.] =55,047.60 Min.

(5) Serving time required to serve non-A&P customers:

a) Total Serving time/day [Total Route Time Less Common Time]
(480.-35.686) = 444.314 min.

b) Less: A&P Serving time
(Full Service)= 253.088
(A&P Finding 548)

c) Non-A&P Serving time/day
[(a) - (b)] 191.226 min.

d) Non-A&P Time per route week
[191.226 min./day x 6 days/week]
1,147.356 min.

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* The total common time per route day is determined by subtracting the total specific serving time of 444.314 minutes per route day (A&P Finding 553) from the 480 minutes in a single day (RA&PX 9), pp. 6, 7).

e) Total serving time per week required to serve non-A&P customers [20 routes x 1,147.356] = 22,947.210

(6) Total Serving time per week after the introduction of the private label program [2,665.88 min. per route x 13 routes] = 35,780.940 min.

(7) Serving time necessary to Serve A&P after Private Label Program Was Instituted [(6) - (5e)]* 12,833.820 min.

(8) A&P deliveries per week 4.4 per day (RA&PX 232, p. 89) x 6 days x 20 routes. 528 per week

(9) Average serving minutes per A&P Delivery [(12) ÷ (13)] 24.306 min.

561. This calculated figure of 24.306 serving minutes as the specific time required to serve A&P compares well with the figure of 20.750 serving minutes obtained directly from the drop service table in the Wisconsin manual for A&P's volume bracket, 501-550 (RA&PX 9, p. 10). It is far less than the 40.50 minutes one would obtain if A&P had received modified drop service. (RA&PX 9, p. 9).

562. Further confirmation that A&P received only drop service can be obtained by reducing the full service time, required to serve A&P, 57.52 minutes (RA&PX 8) by the 58% saving in time achieved by Borden in serving A&P (A&P Finding 559). 58% of 57.52 is 28.36. When this is subtracted from 57.52, the estimated time required to serve A&P will be found to be 23.16 minutes, again very close to the drop service time

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* Since the only change in service was that to A&P, the time needed to serve the other customers remains unchanged. Thus the time spent serving A&P can be obtained by subtracting the time previously required to serve the non-A&P customers from the total serving time required after the introduction of the private label program.

obtained from the Wisconsin Manual.

563. The determination of Borden's anticipated cost of providing drop service delivery to A&P, as defined in RA&PX 9, is as follows:

a.	common cost per delivery (A&P Finding 555)	$ .518641
b.	specific cost per delivery [20.75 minutes (RA&PX 9, p. 10, 501-550 units) x $.17529 (A&P Finding 545b)]	$ 3.637268
c.	total cost per delivery (a + b)	$ 4.155909
d.	delivery cost per point [$4.155909 ÷ 502.5 (A&P Finding 548)]	.008270

564. If Borden succeeded in reducing its delivery services to A&P only to the level described in RA&PX 9 as modified drop service, Borden could have anticipated a delivery cost per point to A&P of $.015160, calculated as follows:

a.	common cost per delivery (A&P Finding 555)	$ .518641
b.	specific cost per delivery [40.50 minutes (RA&PX 9, p. 9, table 2, 501-600 units) x $.17529 (A&P Finding 545b)]	$ 7.099245
c.	total cost per delivery (a + b)	$ 7.617886
d.	delivery cost per point [$7.617886 ÷ 502.5 (A&P Finding 548)]	$ .015160

565. The modified drop cost per delivery of $.015160 is, quite clearly, the highest cost that Borden would have incurred in serving A&P under the private label arrangement. Even this figure, however, is far below the average figure of $.02450 per point calculated by Mr. Malone on CX 54B (A&P Finding 532). The delivery costs set out on CX 54B are three times the $.008270 cost of providing drop service to A&P (A&P Finding 563); twice the Haskins & Sells calculation of $.011807 per point (CX 4); and almost one cent per point higher than Borden's costs if A&P were receiving the equivalent of modified drop service (A&P Finding 564). Whatever standard is applied, therefore, the Malone figures on CX 54B cannot be held to be applicable to Borden's actual costs of doing business with A&P.

566. The criticisms directed by Complaint Counsel against Mr. Havemeyer's calculation of the physical delivery costs (C.C. Br. pp. 48-68) are both unfounded and trivial.

567. Complaint Counsel protest Mr. Havemeyer's calculation of delivery expenses, claiming that he omitted supervisory expense and building expense (C.C. Br. 49-51) and that he improperly deducted $2,500 in travel expenses and "other expenses" (C.C. Br. 51-52). The claim that supervisory and building expenses have been improperly excluded is simply not warranted by the record. Mr. Havemeyer used the Borden ledger for O'Hare delivery expenses (RA&PX 71,

location 723, account 23) to determine the physical delivery cost. He did not create those expenses out of whole cloth. Complaint Counsel point to no other ledgers or ledger entries which Mr. Havemeyer omitted from his calculations. They have not demonstrated that anything was omitted or, if it was, that it was substantial enough to be significant.

568. Complaint Counsel's argument about travel and other expenses is also unfounded. They do not really dispute Mr. Havemeyer's assertion that travel expense does not apply to routemen (C.C. Br. 51), but confine themselves to the observation that a third of the travel expense account represents Mr. Pergler's travel (C.C. Br. 52). Likewise, they claim that only a portion of the $2,000 included by Borden under "other expenses", namely $599, has been shown to be not applicable to A&P (C.C. Br. 52-53).

569. If we were to add back the remaining $1,400 of "other expenses" and the third of travel expenses applicable to Mr. Pergler, about $950, we would increase Borden's delivery expense account by some $2,300 out of a total expense of $38,000 taken by Mr. Havemeyer from Borden's delivery expense records (RA&PX 232, p.78). This would result in an increase of only 6% in Mr. Havemeyer's calculation of all delivery costs per route day except automotive. Thus this expense would be increased by only $4.02, from $67.94 (RA&PX 232, p.78)

to $71.96. The total cost per route day, including automotive expense, would be increased by a like amount from $84.17 (RA&PX 232, p. 78) to $88.19. This is an increase of less than 5%.

570. An increase in Borden's delivery costs by 5% would, of course, result in a corresponding 5% increase in Mr. Havemeyer's determination of Borden's costs to deliver to A&P. Such an increase, however, would still leave his calculation of the physical delivery expenses a long way below Mr. Malone's bloated figures.

571. Complaint Counsel also criticize Mr. Havemeyer's determination of Borden's automative expenses, complaining that he should have used Borden's O'Hare records for that purpose in lieu of Borden's expenses for this activity in the Chicago Metropolitan Region. The use of the records they prefer would increase the automative expense from $16.20 per day to $18.90 (C.C. Br. 54), an obviously insignificant amount.

572. Mr. Havemeyer explained that it was preferable to use expenses for the entire metropolitan region where he could get them (Havemeyer Tr. 7623). This is especially the case with automative expenses because trucks are transferred from branch to branch in the dairy business (Havemeyer Tr. 7628). In the light of the purpose of Mr. Havemeyer's study, namely to determine the cost to Borden of serving

A&P stores throughout the Chicago Metropolitan Region, it is obviously desirable to use regional data where they are available.

573. Moreover, even if we were to add this difference in automative costs of $2.70 to the $4.02 Complaint Counsel urge should be added to the other delivery costs (A&P Finding 569), we would increase the total cost per route day by only $6.72 or by less than 8% of the $84.14 calculated by Mr. Havemeyer (RA&PX 232, p. 78). Such an increase would still leave Mr. Havemeyer's calculation of the physical delivery costs a far cry from Mr. Malone's estimates.

574. Complaint Counsel, totally ignoring the Wisconsin Manual (RA&PX 9), which was co-authored by their own expert, Dr. Lyle Solverson, claim that driver commissions cannot be allocated on a time basis, but must be allocated equally on a per point basis (C.C. Br. 56-69). This argument is without merit (see A&P Findings 646-648 infra).

575. Complaint Counsel also argue that automative expense cannot be allocated on a time basis (C.C. Br. 59-60). This argument is likewise erreneous (see A&P Finding 645).

576. Complaint Counsel's objection to Mr. Havemeyer's determination of the sales figures for schools, A&P and other non-store customers (C.C. Br. 60-63) is also untenable. They object because Mr. Havemeyer was forced to use data from three

different time periods in making this calculation. There was, however, no alternative, and Complaint Counsel propose none. As Mr. Havemeyer explained, he would, of course, have preferred to use all data from the same month, but he was required to use data from March 1965 to March 1966 because he could not obtain complete records for May 1965 (Havemeyer Tr. 8162). To penalize A&P because Borden's records were no longer available, nine years after the fact, would be to deny A&P due process.

577. Moreover, it appears that the unavailability of more accurate records worked to A&P's disadvantage. As Complaint Counsel correctly point out, Mr. Havemeyer's calculation of Borden's sales to A&P rests upon his calculation of the sales to all other customers since the A&P sales were the residue after the sales to all other customers were subtracted from Borden's total sales (C.C. Br. 64). The figure that Mr. Havemeyer determined for the average sales to A&P, 502.5 points per delivery (A&P Finding 548) is almost ten percent below the 547 points per delivery Borden states it sold to A&P in Chicago in 1965 (CX 23E). Such an understatement of A&P's average volume, of course, results in a significant overstatement of Borden's delivery costs to A&P.

578. Complaint Counsel's attack on Mr. Havemeyer's calculation of the average points per case delivered to A&P and the other complaint customers is without merit. These calculations were the considered judgment of an expert in the dairy industry (A&P Findings 120-125, Volume I, pp. 127-130). In any

event, with the exclusion of the Case and Company time standards, the number of cases per delivery have not been used in our findings in calculating the delivery costs. The delivery costs are now determined in the manner specified in the Wisconsin Manual on the basis of cost per delivery, and that cost is in turn divided by the points per delivery to obtain a delivery cost per point (see A&P Findings 545-564). Thus, points per case is not used.

579. The physical delivery costs incurred by Borden are those set out in A&P Finding 563. The highest conceivable costs are those given in A&P Finding 564. These costs should be accepted and the Malone estimates rejected.

8. Indirect Marketing, General and Administrative Costs

580. The indirect general and administrative cost applicable to Borden's delivery of private label milk and dairy products to A&P was $.0053 per point (RA&PX 140; RA&PX 232, pp. 90, 96).

581. RA&PX 140 is a flow chart which demonstrates the manner in which Mr. Havemeyer determined the indirect marketing, general and administrative cost per point (Havemeyer Tr. 7360). Mr. Havemeyer began with the average cost per point determined by Mr. Malone on CX 54B for the indirect marketing costs (Havemeyer Tr. 7361, 7711). As Complaint Counsel recognize [C.C. Finding 9(g)(i)], Mr. Malone made no effort in

preparing CX 54B to accurately reflect these overhead costs. Moreover, Mr. Malone testified that many of the items entered on CX 54B in the section devoted to overhead and burden costs were not applicable to the sales of private label milk to A&P. In particular, he stated that local and national advertising expense, general sales overhead and merchandising expense were not applicable to A&P (Malone Dep. 249).

582. Complaint Counsel protest that Mr. Malone's "average figures" (C.C. Br. 71) cannot be accepted as representative of Borden's expenses in the area covered by A&P's Chicago unit (C.C. Br. 71). Mr. Havemeyer, however, while fully aware of the deficiences in Mr. Malone's calculations, as manifested by the numerous modifications he made in them, had no other record to which he could go to determine many of these indirect expenses (Havemeyer Tr. 8146)

583. The total indirect marketing cost calculated by Mr. Malone was $.0151 per point (Havemeyer Tr. 7360; RA&PX 140; RA&PX 232, p. 90). Mr. Malone's calculation of the indirect expenses on CX 54B is broken down into several segments (Havemeyer Tr. 7360-61; CX 54B). Some of those sub-expense items, namely those for local and national advertising, merchandising and "other income and deduction expenses" were not applicable to the private label business at all (Havemeyer Tr. 7360-61). These expense categories totalled $.0037 (Havemeyer Tr. 7361; RA&PX 140; RA&PX 232,

p. 90; CX 54B). Subtracting the $.0037 from Mr. Malone's figure of $.0151, one obtains $.0114 as the cost of indirect activities which are in whole or in part applicable to Borden's private label business with A&P (Havemeyer Tr. 7361, 7715; RA&PX 140; RA&PX 232, p. 90).

584. Only a portion of the remaining $.0114 is applicable to the private label business. The remaining $.0014 is composed of four expenses on CX 54B, namely branch clerical, credit and collection, general sales overhead and other delivery expenses (Havemeyer Tr. 7361, 7715; RA&PX 140; RA&PX 232, p. 90).

585. Mr. Havemeyer determined that only 75% of the per point branch clerical expense was chargeable against the private label business (Havemeyer Tr. 7361-62). In reaching this conclusion, Mr. Havemeyer distributed the branch clerical costs on the basis of delivery tickets processsed and the proportion of line items used for private label (RA&PX 232, p. 91; Havemeyer Tr. 7361-62). Allocation of the branch clerical expense was made on the basis of delivery tickets since one of the significant functions of branch clerical activity is the handling of delivery tickets (Havemeyer Tr. 7716).

586. To determine the percentage of the branch clerical expense to be charged against the private label program, Mr. Havemeyer first obtained the information from a Borden record introduced as CX 42D that A&P's sales accounted for 55.7% of Borden's wholesale route sales in the Chicago Metropolitan Region (Havemeyer Tr. 7717; RA&PX 232, p. 91; CX 42D). Mr. Havemeyer then made an analysis of Borden's billings to A&P in Chicago and suburbs for the months of May and September, 1965 and determined that the 11 private label items would account for 75% of A&P's total purchases from Borden (Havemeyer Tr. 7717-18). Mr. Havemeyer selected May and September for this analysis because they are reasonably representative months (Havemeyer Tr. 7719-20). From an examination of these same billings Mr. Havemeyer also ntoed that A&P's 11 private label items required only 11 out of the 38 line codes required for billing (Havemeyer Tr. 7721; RA&PX 232, p. 91).

587. Finally, Mr. Havemeyer determined that 30% of Borden's total deliveries at O'Hare were made to A&P stores (Havemeyer Tr. 7722-29; RA&PX 232, p. 92).

588. Having determined from Borden's records that sales to A&P accounted for 55.7% of Borden's total wholesale route sales in the Chicago Metropolitan Region and having further

determined that 75% of A&P's purchases were of items covered by the private label program, Mr. Havemeyer multiplied these two percentages together to determine that 41.8% of Borden's total wholesale route sales could be expected to be made in private label (Havemeyer Tr. 7729-30; RA&PX 232, p. 91). Having also determined that only 30% of the total number of deliveries were to A&P stores and, furthermore, that only 11/38s of the number of line items processed on the Borden billings to A&P were for private label items, Mr. Havemeyer multiplied the 30% by 11/38s to determine that 8.7% of Borden's total clerical costs would be incurred in connection with sales of private label milk and dairy products to A&P (Havemeyer Tr. 7730; RA&PX 232, p. 32).

589. Thus, Mr. Havemeyer determined that, whereas sales of private label milk to A&P could be expected to account for 41.8% of Borden's total wholesale route sales, only 8.7% of total branch clerical costs would be expended on behalf of the private label items. The branch clerical cost for private label products is thus only 1/5 of the cost one would expect if these costs were allocated on a per point basis. Dividing 8.7 by 41.8, Mr. Havemeyer determined that the proportion of branch clerical expense required for private label items was only 20.8% of that required for all items (Havemeyer Tr. 7730; RA&PX 232, p. 91). He rounded this figure up to 25% (Havemeyer Tr. 7730; RA&PX 232, p. 91).

590. Complaint Counsel claim that Mr. Havemeyer's method of allocating the branch clerical expenses was inappropriate because clerical costs are not related solely to the delivery ticket. Their criticisms are without merit. As we point out within, Mr. Havemeyer's analysis of the branch clerical expenses is appropriate. If anything, it over charges A&P (see A&P Findings 685-688 infra).

591. Mr. Havemeyer allocated the credit and collection expense in the same manner as the branch clerical (Havemeyer Tr. 7737). Although complaint counsel did not cross examine Mr. Havemeyer about his reliance on this process for determining the proper method of allocating credit and collection expense other than to point out that a substantial number of customers were cash customers, they now claim, without the benefit of record evidence, that Mr. Havemeyer's allocation was improper (Havemeyer Tr. 7737). There is no basis for their argument. Mr. Havemeyer, whose credentials to offer expert testimony on the question of the proper allocation of costs in the dairy industry are outstanding (A&P Findings 120-125, Volume I, pp. 127-130), presented testimony which was uncontradicted about the proper method to allocate such expense. That testimony must be accepted in the absence of some record basis for its rejection.

592. Mr. Havemeyer determined that 90% of the general sales overhead expense included by Mr. Malone in CX 54B would not be applicable to the private label program. We note at the outset that Mr. Malone testified that none of it would be applicable (Malone Dep. 249). In reaching his determination that only 10% of general sales overhead would be applicable to the private label program, Mr. Havemeyer began with the expense incurred by Borden in Wisconsin for this activity, as calculated on CX 4 (Havemeyer Tr. 7740). Mr. Havemeyer divided the general sales expense applicable to private label by four million points, four million points being the volume of Borden's sales to A&P in the Chicago Metropolitan and Eastern Iowa-Central Illinois Region. Mr. Havemeyer had obtained these figures from CX 42D. In this way Mr. Havemeyer obtained a cost per point of $.00028 as the general sales overhead applicable to the private label program (Havemeyer Tr. 7740). This $.0028 figure is only 8% of the $.0035 which Mr. Malone calculated as the average cost per point for the general sales overhead on CX 54B (Havemeyer Tr. 7746). Mr. Havemeyer rounded the 8% up to 10% and thus determined that 90% of the sales overhead per point calculated by Mr. Malone would not be applicable to the private label program (Havemeyer Tr. 7747).

593. Complaint Counsel protest that Mr. Havemeyer's calculations are invalid because he has mixed sales and expenses from different areas and time periods (C.C. Br. 78-79). Mr. Havemeyer explained that it was valid to apply the overhead selling expenses determined for private label by Haskins & Sells for Borden's Wisconsin region to the Chicago region because such expense is a fixed one. It does not increase or decrease proportionately with volume of sales. In other words, one would expect that Borden would spend $1,135 in overhead selling expenses in connection with private label products whether "a lot or a little" is sold (Havemeyer Tr. 8145-46).

594. Mr. Havemeyer determined that 95% of "other delivery costs" were not allocable to the private label program (Havemeyer Tr. 7363; RA&PX 140; RA&PX 232, p. 90). Mr. Havemeyer had pointed out that product waste and petty cash disbursements comprised the other delivery costs included by Mr. Malone on CX 54B (Havemeyer Tr. 7363).

595. Complaint Counsel now object to Mr. Havemeyer's treatment of other delivery costs because they claim that there is no information as to what is represented by "other delivery cost" in CX 54B (C.C. Br. 81). Mr. Havemeyer gave his professional judgment, however, that Mr. Malone's other

delivery costs were made up entirely of product waste and petty cash disbursements. Complaint Counsel have come forward with no evidence that he is wrong. Mr. Malone is dead and unable to tell anyone what he included in other delivery costs.

596. Complaint Counsel also dispute Mr. Havemeyer's consideration of the product waste and petty cash expenditures (C. C. Finding 9g, 8, 9). Their complaints are without merit (see A&P Findings 705-716, and 723, 724, *infra*).

597. Mr. Havemeyer's calculation of the indirect marketing and administrative cost per point is reliable and should be accepted.

9. Conclusion

598. Mr. Havemeyer's analysis has demonstrated that the so-called Malone study, CX 54B, is totally inapplicable to the private label program. His analysis has also demonstrated that Borden would have made substantial profits on sales of private label milk and dairy products to A&P. A summary of the profit to be anticipated by Borden under its private label program with A&P is as follows:

Margin Per Point Before Delivery and G.S.&A. (A&P Finding 535, Table 2)		$.033772
Delivery cost Per Point Drop Service (A&P Finding 563)	$.008270	
Applicable Indirect Costs Per Point (RA&PX 232, p. 90)	.00530	.013570
Profit Per Point, Drop Service		$.020202
Price Per Point (RA&PX 232, Column H)		.1635
% Profit, Drop Service Delivery ($.020202 ÷ $.1635)		12.36%

599. On the assumption that A&P received modified drop service, the profit that Borden could have anticipated on private label milk and dairy products to A&P can be determined as follows:

Margin Per Point Delivery and G.S.&A (A&P Finding 535, Table 2)		$ .033772
Delivery Cost Per Point Modified Drop Service (A&P Finding 564)	$.015160	
Applicable Indirect Costs Per Point (RA&PX 232, p. 90)	.00530	.020460
Profit Per Point, Modified Drop Service		.013312
Price Per Point (RA&PX 232, Column H)		.1635
% Profit, Modified Drop Service ($.013312 ÷ $.1635)		8.14%

600. Borden could have anticipated making a 12.36% profit on its private label sales to A&P (or at the worse 8.14% if it was providing modified drop service to A&P). This is a very substantial profit and compares very favorably with Borden's overall profit in 1965 of 3.65% (Havemeyer Tr. 7369). Borden's profit on private label sales to A&P is also far in excess of the net profit of 3.77% earned by all companies in the dairy industry in 1965 (Havemeyer Tr. 7369).

601. The inescapable conclusion is that Borden could have anticipated earning a substantial profit on its private label sales of milk and dairy products to A&P in 1965. The Malone studies on CX 54B are totally unreliable, therefore, and should be rejected.

C. THE CASE AND COMPANY ILLINOIS ("O'HARE") COST STUDY DEMONSTRATES THAT THE LOWER PRICES BORDEN CHARGED A&P IN COMPARISON WITH BORDEN'S PRICES TO THE 28 ALLEGEDLY INJURED GROCERY STORE CUSTOMERS ON THE O'HARE BRANCH WERE JUSTIFIED BY THE LOWER COSTS INCURRED BY BORDEN IN SERVING A&P

1. Introduction

602. Mr. Havemeyer undertook a study of Borden's costs in March 1966 of serving A&P and its cost of serving each of the Borden customers identified on CX 183, the O'Hare Branch allegedly injured customers (Havemeyer Tr. 8192). RA&PX 155 is a listing of the underlying documents used by Mr. Havemeyer in this study (Havemeyer Tr. 8192-93). The purpose of this study was to determine whether the difference in net price charged to A&P and to each of the allegedly injured customers was equalled or exceeded by a difference in the cost of service. The price differential was determined and there was then subtracted from it the difference between the cost of serving A&P and the cost of serving the customer whose price and cost were being compared with A&P's (Havemeyer Tr. 8194).

603. Two types of comparisons were performed. In the first comparison, A&P's purchases of private label items only were compared against all of the milk and dairy purchases by the allegedly injured customers from Borden. In the second comparison, all of A&P's purchases from Borden

were compared against all of the purchases by the allegedly injured customers from Borden (Havemeyer Tr. 8195). This second comparison is more meaningful, since it compares like against like. The first comparison was prepared by Mr. Havemeyer for the sole purpose of responding to the "price discrimination" (set out in CX 183A-D) which Complaint Counsel allege was suffered by Borden's non-A&P customers on the O'Hare Branch. That exhibit sets out the discount A&P received from Borden list prices on only the 11 private label items purchased (Bitting Tr. 4770, 4812). On the other hand, the discount which is set out for the non-A&P customers is a discount which those customers received on all of their purchases from Borden taken together (Bitting Tr. 4756, 4812).

604. RA&PX 158 is a flow chart which shows the manner in which Case and Company arrived at its conclusions with respect to the comparative price and cost differences (Havemeyer Tr. 8199). The flow chart indicates that the ultimate conclusion as to justification was based upon a comparison of differences, namely the difference in discount per point received by A&P and by the allegedly injured customer and the difference in Borden's cost per point of serving A&P and of serving each of these customers (Havemeyer Tr. 8199).

605. The elements of the marketing cost considered by Mr. Havemeyer in his cost study were broken down into several functions. These functions are truck loading, physical delivery, branch clerical, product waste, branch selling, Borden Label advertising, Borden Label merchandising and overhead costs (Havemeyer Tr. 8200; RA&PX 158). The cost per point to perform each of these functions was determined for A&P and for each of the allegedly injured customers (Havemeyer Tr. 8200; RA&PX 158). The costs per point of performing these functions were added together to determine a total cost per point for A&P and for each allegedly injured customer, and these two costs were subtracted one from the other, to arrive at a difference in marketing cost per point between A&P and each allegedly injured customer. (Havemeyer Tr. 8200; RA&PX 158). The difference in discount per point from list price received by A&P and by each allegedly injured customer was then determined (Havemeyer Tr. 8200; RA&PX 158). The difference in discount was then compared against the difference in cost in order to determine whether or not the price charged to A&P was justified by the lower costs of serving A&P (Havemeyer Tr. 8200; RA&PX 158). RA&PX 159 is an illustration of the cost and price comparison performed by Case and Company for A&P and one of the allegedly injured customers, Mayfair Foods (Havemeyer Tr. 8202).

606. The cost and discount studies are contained in RA&PX 170-179 (Havemeyer Tr. 8233, 8253-54). The results of

Mr. Havemeyer's study are also found in RA&PX 233. The studies were conducted for all of the allegedly injured customers on the O'Hare Branch in the same manner (Havemeyer Tr. 8234).*

607. Complaint Counsel criticize Mr. Havemeyer's study on the grounds that only one month's record of one account was examined, and that there was no study made to determine that the expenses included in the calculations are either typical or complete (e.g., C.C. Br. 167). In selecting March 1966, Mr. Havemeyer was doing no more than responding to Complaint Counsel's selection

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* Initially, eight of the larger allegedly injured customers were chosen, for slightly more detailed analysis (Havemeyer Tr. 8234). For each of those eight customers, Case and Company determined the specific details of their deliveries from entries in route books. For the remaining 20 customers, which were the small customers among the group of allegedly disfavored customers, Case and Company used average figures for three functions involved in the studies, namely, dollars per point of merchandise delivered, points per case delivered and the percent of merchandise delivered in glass (Havemeyer Tr. 8235-36). Subsequently, studies RA&PX 201A-U and RA&PX 202A-T were prepared in which the specific details of all necessary data were determined individually for all 28 customers (Havemeyer Tr. 8960-62). In the final revised exhibit, RA&PX 233, which contains one copy of, or a revision of, each page in RA&PX 170-179 (exclusive of underlying source documents), and also revisions of each other exhibit relating to the O'Hare study which were changed as a result of the revisions made in that final exhibit, the details of all necessary data were likewise separately calculated for all 28 customers. (See RA&PX 233, p. 69.)

of March 1966 to represent the alleged price discriminations (CX 183 C-D). If this criticism is sound, it is at least as sound when directed to Complaint Counsel's Exhibit CX 183 A-D. Furthermore, the Case and Company study was a good faith effort made by a reputable management consulting firm with substantial experience in the dairy industry. Five thousand man hours were spent examining records and preparing the study at a cost of $125,000 (Havemeyer Tr. 9144). Mr. Havemeyer instructed the staff who assisted him in the preparation of his studies to be alert for transfers into and out of accounts and to watch for functional expenses which were apparently unaccounted for in the Borden records (Havemeyer Tr. 7520). The Case and Company staff examined the Borden Company records with the objective of assuring themselves that the amounts entered in an account accurately reflected Borden's expenses (Havemeyer Tr. 7520). In their review of Borden's records, Case and Company personnel sought corroboration and support for the account data as a general matter (Havemeyer Tr. 7598). In many instances discussed throughout these findings, Mr. Havemeyer made adjustments to Borden's data which were adverse to A&P's position. The data on which Case and Company relied was, under all of the circumstances, sufficient to support its conclusions.

2. Truck Loading Costs

608. RA&PX 160 is a flow chart which indicates the general procedure followed in determining the truck loading cost (Havemeyer Tr. 8206-8207). In essence, the determination of the truck loading costs consisted of first determining the amount of money spent on truck loading, allocating that expense among several categories of sales, based on the percentage of total sales in each category, and then dividing the truck loading expense allocated to the regular wholesale category by the number of cases loaded into regular wholesale trucks to obtain a truck loading cost per case (Havemeyer Tr. 8993). The average number of points per case for the customer whose costs were being calculated were then determined by an analysis of entries in Borden's route books, and the truck loading cost per case was divided by the points per case to obtain the truck loading cost per point for that customer (RA&PX 160).

609. From Borden accounting record 723-037 for the O'Hare Branch in March 1966, Case and Company obtained the truck loading expenses for all of the business of the O'Hare Branch (Havemeyer Tr. 8209, 8243; RA&PX 160). This document is entitled "Final Expense Summary"; it

is a portion of RA&PX 72; and it reflects all of the loading expense at Borden's O'Hare Branch (Havemeyer Tr. 8243). Before proceeding with the analysis, it was first necessary to allocate the correct portion of this total truck loading expense to the wholesale business (Havemeyer Tr. 8209, RA&PX 160). In order to do so the truck loading expenses were redistributed by Mr. Havemeyer among regular wholesale, vendor, bulk wholesale and retail routes on the basis of the volume of sales in each of those categories* (Havemeyer Tr. 8209, 8243-44, 8993, 9072; RA&PX 233, p. 10). These four categories of sales and one additional sales category, counter sales, account for all of Borden's regular milk sales in the Metropolitan Chicago Area (see, for example, RA&PX 69 and RA&PX 75, lines 64-70). None of the O'Hare Branch truck loading expenses were redistributed to the counter sales account, however, because, as the Borden branch manager of the O'Hare Branch in March 1966, Joseph Pergler, explained, over 99% of all counter sales credited to the O'Hare Branch involved sales by the Borden Company to the Great Lakes Naval

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* In Mr. Havemeyer's initial study, no allocation was made to retail routes (Havemeyer Tr. 8244; RA&PX 170, p. 21). In the final study, however, a part of the loading expense was distributed to retail routes (see RA&PX 233, p. 10).

Station which were made directly from Borden's Woodstock plant to the Naval Station without ever passing through O'Hare (Pergler Tr. 5631-32, 5693).

610. Complaint Counsel protest that Mr. Havemeyer allocated too much expense to the loading of wholesale trucks by apportioning the expenses equally per point among all four types of distribution systems - wholesale, bulk wholesale, vendor and retail-operated out of the O'Hare Branch (C.C. Br. 103-104). They point out that in March 1966, the O'Hare Branch had 33 retail routes delivering about 500,000 points per month and a combined 33 routes for wholesale and bulk wholesale, delivering about 3,100,000 points. They then state that "obviously, the loading cost per point is not going to be the same as between retail trucks and the two types of wholesale trucks" (C.C. Br. 104). No support for the conclusion is given other than a reference to the fact that Mr. Havemeyer admitted that "hypothetically there would be a difference in loading expense for each of these trucks, due to the fact that a much smaller volume is being loaded on to the same number of trucks" (C.C. Br. 104).*

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* Complaint Counsel are not now contending, and their questioning of Mr. Havemeyer at the time (Tr. 8273) makes clear that they were not then inferring, that there is a constant loading cost per truck. Such would, of course, be contrary to their argument that the loading costs for identical items are equal (C.C. Br. 97-98).

611. Complaint Counsel fail to mention that Mr. Havemeyer stated that this might hypothetically be the case because of the fact that some time may be involved, which does not vary with the amount loaded on the truck, attributable to moving the trucks in and out of the loading platform (Havemeyer Tr. 8273). Mr. Havemeyer pointed out, however, that two reasons militate against such extra expenses. First, only a small number of men, and a small proportion of the loading crew, would be involved in jockeying, that is the moving of the trucks in and out of the loading platform. Secondly, Mr. Havemeyer stated that he didn't recall any evidence of much jockeying or even of any jockeying at all. There could very well have been a long island type platform where trucks could have been backed in at the end of the route day and not have to be jockeyed (Havemeyer Tr. 8273).

612. In any event, Complaint Counsel do not suggest any more appropriate method than that employed by Mr. Havemeyer. They recognize that Borden's loading expense at O'Hare was "lumped in one account" (C.C. Br. 103). Mr. Havemeyer's allocation for this expense on a per point basis was, therefore, reasonable.

613. Mr. Havemeyer was able to obtain the volume, by points delivered, in March 1966 by the O'Hare Branch for both the regular wholesale and bulk wholesale routes directly from RA&PX 76 (Havemeyer Tr. 8244). The data for the volume delivered on the O'Hare retail routes was derivable directly from another Borden accounting record, introduced as RA&PX 77 (Havemeyer Tr. 8993-94) (see RA&PX 233, p. 10, fn. 13).

614. Data was not available from Borden accounting records now in existence to enable Mr. Havemeyer to determine directly the point value of the vendor business at O'Hare for March 1966 (Havemeyer Tr. 8244). Although O'Hare vendor sales records were not available for March 1966, Mr. Havemeyer was able to locate O'Hare vendor sales records for May 1965. He also had the vendor sales from Borden records for the entire Chicago metropolitan region for both May 1965 and March 1966 (Havemeyer Tr. 8244-47; RA&PX 70 and 75). To determine the vendor sales in O'Hare for March 1966, Mr. Havemeyer was, therefore, required to assume that O'Hare's vendor sales experienced the same degree of change between May 1965 and March 1966 as was experienced in Borden's entire Chicago metropolitan region (Havemeyer Tr. 8247, 8251, 8255-56).

615. Complaint Counsel object to the assumption made by Mr. Havemeyer. His assumption, however, was a reasonable one under the circumstances. This was a cost study prepared by a buyer many years after the facts. The data on vendor sales at the O'Hare Branch in March 1966 were not available (Havemeyer Tr. 8244). Not only is a buyer to be given considerably greater latitude than a seller in presenting a cost study in a Robinson-Patman case, but to refuse to accept Mr. Havemeyer's cost study on truck loading costs because of this assumption would be to subject the respondent buyer to prejudice because of the Commission's delay in filing this complaint against A&P.

616. Having determined the truck loading costs at O'Hare that were attributable to the loading of trucks on regular wholesale routes, the next step, as stated above, was to determine the truck loading cost per case (RA&PX 160). In the truck loading function, the basic unit of activity and the appropriate standard for allocating costs is the case since cases are the items that are handled in loading trucks (Havemeyer Tr. 8209). Case and Company, therefore, determined the number of wholesale cases which were loaded at O'Hare in 1966 and divided the portion of truck loading expense that was allocated to the O'Hare wholesale

business by the number of cases loaded to arrive at the truck loading cost per case (Havemeyer Tr. 8209, RA&PX 160). For both A&P and the customer being compared against A&P, Case and Company then determined the average number of points of merchandise per case received by that customer from an analysis of route book entries (Havemeyer Tr. 8209). Having determined both the points per case to the customer and the truck loading cost per case, the truck loading cost per point was determined by division (Havemeyer Tr. 8209). The figures derived in this manner for A&P and Mayfair Foods are set out on RA&PX 159 (Havemeyer Tr. 8209-10). The truck loading costs for all 28 comparisons are set out in RA&PX 233, pp. 39-66, and in A&P Finding 785.

617. Mayfair's loading costs are shown to be higher than A&P's (Havemeyer Tr. 8209-10). Similarly, the truck loading costs for most, but not all, of the other allegedly injured customers on the O'Hare Branch are shown to be slightly higher than Borden's costs for performing this function for A&P (RA&PX 233, pp. 39-66).* The

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* Borden's cost of serving Greenview Fruit, Forest Food Mart, Stickland's Store No. 256, and Peterson's Foods (RA&PX 233, pp.47, 55, 56 and 65) are lower than Borden's cost of loading private label items for A&P.

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truck loading cost varies from customer to customer, and in the case of A&P also varies depending on whether the cost of this function is calculated for private label items only or for all items delivered to A&P (Havemeyer Tr. 8210, RA&PX 233, pp. 39-66).* Higher truck loading costs per point result from the difference in the mix of the merchandise ordered and differences in the quantities of each unit ordered. If an order is such that it has, on the average, fewer containers per case, then, of course, the loading cost per point is increased (Havemeyer Tr. 8210).

618. Complaint Counsel in keeping with the picayune nature of their criticisms of Mr. Havemeyer's studies, object to his calculation of truck loading costs. The cost differences resulting from Mr. Havemeyer's analysis are small in all cases - indeed they favor the complaint

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* When the truck loading function is determined for Borden's cost of providing all products to A&P, and not simply private label products, Borden's truck loading costs per point to serve A&P are also higher than Borden's costs of serving Bel Park Foods, Strickland's Store No. 159, Greenview Fruit, Bill's Market No. 194, Forest Food Mart, Strickland's Store No. 256, Floom Bros., Jos. Berlin & Son, and Peterson's Foods (RA&PX 233, pp. 46-48, 51, 55, 56, 58, 59 and 65).

customers in many instances (A&P Finding 617). In spite of the minor part that this functional activity plays in Mr. Havemeyer's analysis we are subjected to a seventeen page critique of the allocation of these costs (C.C. Br. 95-112). Such an exhaustive analysis of so small a matter is unwarranted, but we feel compelled to respond to these criticisms.

619. Complaint Counsel protest that the allocation of loading expense conflicts with Section 2(a) of the Robinson-Patman Act. They take the position that, while the "Robinson-Patman Act provides for cost differentials '. . . resulting from the differeing methods or quantities in which such commodities [commodities of like grade and quality] are to such purchaser sold and delivered,'" Mr. Havemeyer's method of allocation considering, as it does, the product mix "does not take into account the methods or quantities of delivering of products of like grade and quality." (C.C. Br. 97-98).

620. It should be noted, at the outset, that, inasmuch as the study was prepared in response to CX 183A-D, which compares A&P's price on the entire private label line with the prices on all purchases by others, the parameters of the study were laid down by Complaint Counsel. Their

argument would only make sense if the alleged discrimination presented by Complaint Counsel were limited to a single product such as the gallon carton of milk mentioned by Complaint Counsel (C.C. Br. 97). Since, however, Complaint Counsel have chosen to compare the prices paid for groups of purchases, any study of costs which is responsive must be directed at the costs incurred with respect to those groups of purchases. If a difference in product mix results in a difference in cost, that cost difference must be taken into account.

621. We can perceive no legitimate objection to Mr. Havemeyer's recognition, in his allocation of costs, of the fact that A&P did not take milk in glass containers (more paper gallons can be loaded in a case than glass gallons), or to Mr. Havemeyer's recognition that a different number of units of product are loaded per case, depending on the product mix (Tr. 8210). We fail to recognize the rationale of Complaint Counsel's objection, especially since Complaint Counsel's own expert on this topic, Dr. Lyle Solverson, acknowledged that a determination of costs on a per case basis would be appropriate (Tr. 1623-24).

622. Complaint Counsel also protest that Mr. Havemeyer failed to allocate any building expense to the loading function,

allocating all of it instead to the physical delivery expense (C.C. Br. 102). Mr. Havemeyer explained, however, that the principal purpose of a building is to support the sale and delivery of the products. Hence that expense is chargeable to the customers as a supportive expense, through the route man's time (Havemeyer Tr. 9685). Mr. Havemeyer stated that building expense is sometimes allocated to the various subfunctions but the detail necessary for such an allocation was simply not available (Havemeyer Tr. 9686). Furthermore, had the building expense been so allocated, the result would have been to widen the cost difference in favor of A&P. The reason for this is that various of the subfunctions to which the building expense would otherwise have been allocated such as selling, product waste, and merchandising had no association with A&P. Hence any building expense allocated to those functions would not go to A&P at all, but would go to the non-A&P customers (Havemeyer Tr. 9687). Hence if the building expense allocation employed by Mr. Havemeyer has resulted in any bias, that bias is in favor of Complaint Counsel.

623. Complaint Counsel complain that Mr. Havemeyer has not studied possible extra expense in loading A&P products resulting from the necessity of mixing pallets of A&P label and Borden label products by hand prior to loading (C.C. Br. 107). This objection is without merit (A&P Finding 521).

624. Complaint Counsel complain that there is no foundation for the calculation of the total points delivered on the O'Hare wholesale routes (C.C. Br. 108). Their objection is without merit. As we point out, infra, in A&P Finding 637, Case and Company accurately determined the total points sold on the O'Hare wholesale routes.

625. Mr. Havemeyer's determination of the truck loading costs incurred by Borden at O'Hare in March 1966 in serving A&P and the allegedly injured customers is reliable and should be accepted.

3. Physical Delivery Costs

Introduction

626. The evidence in this case made it plain that Borden's cost of physically delivering milk and dairy products to A&P was materially lower than its cost of physically delivering such products to the allegedly injured customers on the O'Hare route. The evidence showed, first, that A&P accepted sharply reduced service in connection with the private label program and that both Borden and A&P anticipated that this reduction of service would result in a cost saving to Borden (see A&P Findings 176-80, pp. 163-68 and 526, supra). Borden and A&P did, in fact, adhere to

the reduced service requirements of the private label program (see A&P Findings 179 and 180, pp. 167-68, supra). The evidence also made it clear that A&P received a greater average number of points per delivery than did most of the allegedly injured customers on the O'Hare route. It is evident that the delivery cost per point is less for a large delivery than for a small one since there is a certain amount of constant time which remains the same for a large delivery and a small one (Solverson Tr. 1550-51; Havemeyer Tr. 7017). Thus, it is clear from the record that the physical delivery service rendered to A&P was materially less costly than the physical delivery service rendered to the allegedly injured customers on the O'Hare route. To quantify this cost difference is a complex and difficult matter, particularly with respect to a time period long past.

627. RA&PX 161 is a flow chart which indicates the procedures followed by Case and Company in determining the physical distribution cost for each customer (Havemeyer Tr. 8211). From an analysis of the Borden route books, previous testimony and a stipulation of the parties, Case and Company determined the volume in points, delivered to the customer in March 1966, the number of deliveries made in that month to that customer, the number of cash

collections involved in servicing that customer for that month and the type of delivery service provided by Borden to the customer (Havemeyer Tr. 8211-12). With this information in hand, one is able to determine, by the application of time standards or other information as to driver time spent in the delivery function, the delivery time per point to serve each customer (Havemeyer Tr. 8211-12), expressed in minutes per point (Havemeyer Tr. 8213).*

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* In the costs studies presented by A&P in its case in chief, delivery time standards developed by Case and Company were utilized for the purpose of determining the delivery time or serving minutes per point to each customer (Havemeyer Tr. 8213, RA&PX 161). Since the Administrative Law Judge has held that all costs and other data derived from the time standards are inadmissible and has directed that respondent A&P not reargue the admissibility of these standards in its proposed findings, we shall not discuss those time standards, nor shall we have any reference to any calculations or procedures in which those time standards were employed. Respondent does, however, continue to maintain the admissibility of the Case and Company delivery time standards and the validity of the calculations based on their use. For the purposes of these findings A&P has used time standard information in the record other than the Case and Company standards.

628. It was then necessary to determine the cost per minute of operating a route system (Havemeyer Tr. 8213). Before obtaining the cost per minute, one is first required to determine the cost of operating a route for a day. That figure was obtained from Borden accounting records (Havemeyer Tr. 8213). The development of the cost per route day is shown on attachment 3 of RA&PX 170, p. 34. Supporting calculations and Borden records will be found between pp. 35 and 46 in RA&PX 170 (Havemeyer Tr. 8370). The calculation of the cost per route day is also set out in RA&PX 233, p. 15. The cost per route day is simply the total cost of operating the route system in March 1966, divided by the number of route days which were operated (Havemeyer Tr. 8371). The expense items included in the total cost of the operation of the Borden routes were vehicle cost, building expenses, delivery compensation and related route operating expenses and delivery supervision expenses (Havemeyer Tr. 8371, RA&PX 170, p. 34, RA&PX 233, p. 15).

629. In the original calculation presented in the hearing, Mr. Havemeyer then determined the cost per serving minute by applying Case and Company's delivery time standards to the cost per route day (Havemeyer Tr. 8213-14; RA&PX 161). Since the Administrative Law Judge has held the

Case and Company time standards to be inadmissible at the hearing and, consequently, all data derived therefrom to be inadmissible, these findings determine the per point cost of the physical delivery function to Borden on the basis of other evidence in the record.

630. With the time required to make a delivery to each customer determined in minutes per point, and having determined a cost per delivery minute, one is able to determine the cost of delivery per point (Havemeyer Tr. 8214).

631. Different delivery costs are, of course, determined for each customer. The difference in delivery cost per point between customers is attributable to differences in the type of service rendered to the customers and differences in the volumes delivered to the customers (Havemeyer Tr. 8214; Solverson Tr. 1551).*

632. RA&PX 162 is a chart prepared by Mr. Havemeyer which illustrates a sample calculation of the delivery costs

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* Mr. Havemeyer also made reference to differences in the number of points included in each case and differences in the percentage of the product taken in glass as having an impact in producing differences in delivery costs (Havemeyer Tr. 8215). As the use of these factors in determining delivery costs involves the use of the Case and Company time standards, these factors will receive no further treatment in these findings.

for one of the allegedly injured customers, Mayfair Foods (Havemeyer Tr. 8217-18). An explanation of the separate steps involved in the calculation will be found in RA&PX 163, and the two documents are keyed together by the use of element numbers (Havemeyer Tr. 8217-18). The explanation found on RA&PX 163 has been revised in the final version of the O'Hare studies to correspond with the revisions made in the study during the course of the hearings. This revised explanation of the steps involved in the calculations is now found in RA&PX 233, pp. 3-4.

Determination of Points Per Delivery For The Allegedly Injured Customers

633. Mr. Havemeyer used CX-183 to determine the dollar value, at list price, of Mayfair's purchases from Borden in March, 1966 (Havemeyer Tr. 8219; RA&PX 162).* From an analysis of the route books, Mr. Havemeyer then

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* As noted elsewhere in these findings, the evidence indicates that the prices reflected in CX 183 are in fact, not list prices, but, rather, they are prices at something under list. (See A&P Findings 255-258, pp. 219-222, supra.) Mr. Havemeyer has accpted the prices as being list prices solely for the purpose of responding to Complaint Counsel's case. It should be noted that the treatment of the prices on CX 183 as list prices results in overstating the difference in prices received by A&P from Borden, and consequently imposing on A&P the burden of cost-justifying an inflated discrimination in price.

determined the average list price per point (Havemeyer Tr. 8219, RA&PX 233, pp. 3-4). The points purchased in March are then determined by simply dividing the dollars purchased by the average list price per point (Havemeyer Tr. 8219; RA&PX 163, element #3; RA&PX 233, p. 3, element #3).

634. Having determined the total points delivered in the month to each customer, Mr. Havemeyer then determined the number of deliveries to the customer in the month from the Borden route book (Havemeyer Tr. 8219; RA&PX 162; RA&PX 163, element #4, RA&PX 233, p. 3, element #4). He then divided the points delivered per month by the deliveries per month to obtain the points per delivery for each customer (Havemeyer Tr. 8219; RA&PX 162; RA&PX 163, element #5; RA&PX 233, p. 3, element #5).* The points per month delivered to each of the allegedly injured customers and the total points delivered in the month of March 1966 to those customers are set out below.

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* The remaining steps in the calculation shown on RA&PX 162 cannot be used in these findings because of the exclusion of the Case and Company time standards.

	CUSTOMER	A LIST PRICE VALUE OF MARCH PURCHASES (1)	B LIST PRICE VALUE PER PT (2)	C POINTS DEL. PER MONTH (3)	D POINTS PER DEL (4)
1	MR. CENTRAL	3,694.63	.2838	13,018.429	482.164
2	MAYFAIR FOODS	3,056.25	.2588	11,809.312	437.382
3	JAMES COX	2,661.91	.2696	9,873.553	365.687
4	MISICKA'S FOODS	1,854.04	.2746	6,751.784	250.066
5	JOS. MICHALOWSKI	1,853.77	.2432	7,622.410	282.311
6	CARDINAL STORES	1,636.18	.2567	6,373.899	236.070
7	MADISON LAVEIGNE	1,580.71	.2870	5,507.700	203.989
8	BEL PARK FOODS	1,443.43	.2918	4,946.642	183.209
9	GREENVIEW FRUIT	1,399.29	.2876	4,865.403	180.200
10	STRICKLAND #159	1,370.82	.2755	4,975.753	184.287
11	ROBERT BATTALI	1,336.70	.2309	5,789.086	214.411
12	EDWARD MARSZAICK	1,313.03	.2640	4,973.599	184.207
13	BILL'S MARKET #194	1,297.92	.2720	4,771.765	176.732
14	GENE'S FOOD SHOP	1,266.40	.2613	4,846.536	210.720
15	SPOT LITE MARKET	1,235.05	.2250	5,489.111	203.300
16	THERESA CRISPINO	1,220.22	.2609	4,676.964	173.221
17	FOREST FOOD MART	1,174.73	.2738	4,290.467	158.906
18	STRICKLAND #256	1,162.93	.3175	3,662.772	135.658
19	CONGRESS FOOD	1,135.48	.2690	4,221.115	156.338
20	FLOOM BROS.	1,104.55	.2702	4,087.898	151.404
21	JOS. BERLIN & SON	1,014.86	.2763	3,673.037	136.038
22	BRUNO NALEPA	1,014.57	.2482	4,087.712	151.397
23	BLANCHE'S FOODS	966.67	.2508	3,854.346	142.754
24	EDWARD TRUTY	964.18	.2437	3,956.422	146.534
25	BARNEY TRAINOR	930.31	.2662	3,494.778	129.436
26	BILL'S MARKET #002	893.24	.2674	3,340.464	123.721
27	PETERSON'S FOODS	890.97	.2850	3,126.211	115.786
28	JOE MILECKI	810.16	.2573	3,148.698	116.618
	Total Complaint Customers			151,235.865	

(1) CX 183 C-D; RA&PX 233, p. 69.

(2) RA&PX 233, p. 69

(3) Col. A ÷ Col. B.

(4) Points Per Del. calculated by dividing points/mo. by deliveri mo. All customers received 27 deliveries in the month of March, except Gene's Food Shop which received 23 (see RA&PX 233, p. 69).

Determination of Points Per Delivery To A&P

635. The average points per delivery to the A&P stores served out of the O'Hare Branch in March, 1966 consisted of 444.7 points per delivery, of which 197.7 were private label and 244.0 were Borden label (RA&PX 180; RA&PX 170, p. 10; RA&PX 233, p. 8). The details of the derivation of the points per delivery to A&P are shown on RA&PX 180 (Havemeyer Tr. 8302-8317) and are explained in A&P Findings 636-641.

636. In order to determine the average points per delivery to each A&P store served out of the O'Hare Branch, it is first necessary to determine the total points sold to the A&P stores served out of the O'Hare Branch, and divide that figure by the number of deliveries to those stores (see RA&PX 180, line 13).

637. The determination of the total points delivered to A&P on the O'Hare Branch in March, 1966 was complicated by the fact that there were no Borden records in existence at the time of the hearing which gave such figures directly. A laborious process was, therefore, required to make this determination. Mr. Havemeyer began by aggregating the point volumes that appear on summary tabulations in the front of each of the O'Hare route books for March 1966

to obtain the total volume sold to all customers on all the O'Hare regular wholesale routes (Havemeyer Tr. 8302; RA&PX 180). The last figure on the summary tabulations in the front of the route books represents the total wholesale points sold on the route, even though the figure is written on a line entitled "Retail Points" (Daube Tr. 9179-80). Case and Company made an independent check to determine whether that figure conformed with the number of points shown as being delivered on the individual pages in the route books (Havemeyer Tr. 8305). The check indicated that the summary figure was quite close to that determined by totalling the entries from the actual route book pages (Havemeyer Tr. 8305).

638. The next step in calculating the points delivered to these A&P stores is to determine the total points delivered to all other customers. The total points delivered to all these other customers -- all indepednent stores receiving limited service delivery, independent stores receiving full service delivery, schools, and other non-store customers -- was then determined from a detailed analysis of the route books (Havemeyer Tr. 8307-16; RA&PX 180), as is more fully explained in A&P Findings 639-640. The aggregate of these points is then subtracted from the total points to arrive at the volume delivered to A&P (Havemeyer Tr. 8316-17).

639. The total dollar value, at list, of merchandise delivered to the independent stores - both those receiving full service and those receiving limited service - was determined from the individual entries in the Borden route books for the entire month of March, 1966 (Havemeyer Tr. 8307-08). The list price average dollar value per point for these two categories of stores was determined by dividing the total dollars delivered to all the stores in each category for the two week period ending March 19, 1966 by the total number of points delivered to each category of customer in those same two weeks (Havemeyer Tr. 8308-12; RA&PX 171, p. 78). Then, as with the allegedly injured customers, this total dollar value for March, 1966 was divided by the list price average dollar value per point to derive the total number of points delivered (Havemeyer Tr. 8307, 8319).

640. For the schools on the regular wholesale routes, Case and Company went through the route books, picked out each school, determined the quantity of each product which it took and multiplied those quantities by the corresponding point values to determine the total points taken by schools (Havemeyer Tr. 8315). Each entry for the entire month of March, 1966 was determined by actual count (Havemeyer Tr. 8316). The same process was followed for the non-store

customers to determine the total points delivered to those customers (Havemeyer Tr. 8315).

641. As stated above, the total points delivered to A&P is the residual of the total points delivered on the Borden O'Hare regular wholesale routes after the deliveries to those other categories of customers are subtracted out (Havemeyer Tr. 8316). The total points thus determined as having been delivered to A&P was 1,026,278 (RA&PX 180, line 8, col. 1). This figure was in turn broken down into 459,322 private label points and 566,956 Borden label points (RA&PX 180, line 8, col. 2, 3). This was done by using the Borden billing summaries for Chicago and suburbs for the two weeks ending March 19th to determine the ratio of private label points to total points and applying that ratio to the total points delivered to A&P to obtain the private label points. The Borden label points delivered to A&P is, of course, the difference between the two figures (Havemeyer Tr. 8317). Mr. Havemeyer was required to follow this procedure for allocating the total points delivered to A&P between Borden label and private label, because, per instructions from Borden, the Borden drivers had not posted the quantities delivered to A&P in the route books (Havemeyer Tr. 8318).

Determination Of The Cost Per Route Day To Operate The O'Hare Route System

642. Having determined the average points per delivery to A&P and each of the complaint customers, the next step in the process is to determine the cost per minute of operating the route system. This first requires the determination of the cost of operating a route per day (see A&P Finding 628; see also RA&PX 9, p. 4). The cost per route day was determined by obtaining from Borden accounting records the total cost of operating the physical delivery system at O'Hare, which was then divided by the number of route days to get the cost per route day (Havemeyer Tr. 8371; RA&PX 170, p. 34; RA&PX 233, p. 15). The cost per route day was determined by Mr. Havemeyer to be $108.50 (RA&PX 233, p. 15; RA&PX 170, p. 34).

643. The types of expenses which go into the determination of the cost per route day are shown on p. 34 of RA&PX 170 (Havemeyer Tr. 8371). The items making up this delivery expense were the vehicle cost, the building expense, the delivery compensation and related route operating expenses and delivery supervision expense (Havemeyer Tr. 8371). Certain expenses, such as those incurred for product waste and branch selling costs were subtracted from the ledger

accounts for delivery costs because they were separately allocated to those other functions (Havemeyer Tr. 8377). Salary supervision was allocated between wholesale and bulk wholesale routes (Havemeyer Tr. 8387).

644. Complaint Counsel argue (C.C. Finding 15(b)(iv)) that building expense should be allocated only in part to delivery and should not be allocated on a time basis. However, the Government's accountant, Mr. Lemberg, admitted that part of the building expense was appropriately allocable to the delivery function, that he knew of no precise basis upon which the building expense could be divided between delivery and other functions, that it was acceptable in some circumstances to allocate a cost on the basis of the principal activity with which it is associated, and that the delivery component of the building expense could properly be allocated on the same basis as the routemen's salaries (Lemberg Tr. 9460-64). It is therefore evident that this section of Mr. Havemeyer's allocation is proper.

645. Complaint Counsel argue that the automotive expense should be allocated on a volume basis rather than a time basis, as allocated by Mr. Havemeyer.* (C.C. Finding 15(b)(v)).

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* Complaint Counsel apparently agree with A&P that an allocation on the basis of mileage is not appropriate. See Lemberg Tr. 9446.

However, it is obvious that an allocation on the basis of volume is no less arbitrary than a time allocation. For example, the Government's accountant, Mr. Lemberg, admitted that such variables as mileage and truck operating costs (insurance, licenses, taxes) have virtually no correlation with volume transported (Lemberg Tr. 9447-9451). Mr. Lemberg also stated that in many situations, it would be permissible (even preferable) to allocate truck expenses on a time basis rather than on a volume basis and that it is a generally accepted accounting technique to allocate truck expense on the same basis as salesmen's compensation expense (Lemberg Tr. 9453-60). It is therefore evident that it was perfectly proper for Mr. Havemeyer to allocate automotive expense on a time basis.

646. Complaint Counsel urge that drivers' commissions, since they were paid on a per point basis, cannot be allocated among customers on the basis of time required to deliver to each customer, but, rather, must be allocated equally among all customers and cannot result in a difference in delivery costs between A&P and the complaint customers (C.C. Finding 15(b)(iii)).

647. Complaint Counsel are in error. The commission is part of the driver's compensation package and is no more than a mechanism for arriving at a pay level for drivers (Havemeyer Tr. 9665-66). Time is a critical factor and, hence, serves as a logical basis for the allocation of all compensation paid to drivers. If a procedure can be established that saves time, then costs are saved. Furthermore, the deliveryman is not really a salesman, although he is referred to as a driver-salesman, but, rather, he is essentially an order taker (Havemeyer Tr. 9667, 9671-73). In such cases, it is appropriate that his compensation be allocated on a time basis (Havemeyer Tr. 9667). The Commission's own expert, William Lemberg, also agreed that the compensation of salesmen who are no more than order takers should be allocated on a time basis (Lemberg Tr. 9431-33). Several state milk regulatory authorities also take the view that it is appropriate to allocate milk drivers' commissions on a time basis (see RA&PX 245A, page III-7; RA&PX 245B, pp. III-5, RA&PX 245C, pp. III-5, 6). And indeed, a bulletin of the Wisconsin Dept.of Agriculture, entitled "Allocation of Wholesale Milk Distribution Costs" (RA&PX 9) authored by the Commission's own expert on the allocation of wholesale milk distribution costs, Dr. Lyle Solverson (RA&PX 9, p. 2), states that drivers' commissions are to be allocated

on a time basis (RA&PX 9, pp. 4-6). Mr. Lemberg acknowledged that the Wisconsin authorities do suggest a method of cost allocation which allocates routemen's commissions on a time basis (Lemberg Tr. 9442, 9444-45).

648. On the basis of the evidence summarized above, Mr. Havemeyer was justified in allocating driver commissions on a time basis for the purposes of his study.

Determination of Cost Per Route Minute

649. Having determined a cost per route day, the next step is to determine the cost per route minute. While respondent is unable to use the Case and Company time standards to make this determination in these findings because of the Administrative Law Judge's prior rulings, a relatively simple process of determining this cost is suggested in the Wisconsin Manual (RA&PX 9), which is in evidence. The cost per route day of $108.50 (RA&PX 233, p. 15; RA&PX 170, p. 34) is merely divided by 480 minutes - 8 hours per day x 60 minutes (RA&PX 9, p. 6). The normal work day is 8 hours, and the available records indicate that those were, in fact, the hours worked by the Borden drivers (Havemeyer Tr. 8732-33; RA&PX 92). It can be readily seen, therefore, that a cost per route minute of $.22604 ($108.50 ÷ 480) can be adopted as the cost of operating the Borden regular wholesale routes at O'Hare in March, 1966.

650. The use of material from the Wisconsin manual is entirely appropriate. As the Supreme Court pointed out in Automatic Canteen Co. v. FTC, 346 U.S. 61 (1953), "knowledge generally available to the buyer from published data or experience in the trade could be used by [a defendant buyer] to make a reasonable showing of his sellers' costs" (at 69). As we have already demonstrated above (A&P Findings 541-544), data from the Wisconsin manual are applicable to the Chicago Metropolitan Area.

Determination of Time Required To Make Deliveries to A&P and the Allegedly Injured Customers

651. Since we have both the cost per route minute and the average points per delivery for A&P and each complaint customer, it remains only to determine the time that it could be expected would be required to make those deliveries. This can be done in a straightforward manner by the application of the time standards set out in the Wisconsin Manual, RA&PX 9. The service time per delivery for the several volumes of delivery for both full service and "modified drop service" are set out in two tables on page 9 of that manual. All complaint customers

received full service delivery (RA&PX 170, 82; RA&PX 233, p. 30). The Commission's expert, Dr. Solverson, testified that on the basis of his review of the private label agreement and the testimony of Borden personnel, he concluded that A&P received the "modified drop service" (Solverson Tr. 1557-58). Those tables are repeated here for the Court's convenience.

TABLE 1.—FULL SERVICE—SERVICE TIME PER DELIVERY

Number of units	Service time in minutes	Number of units	Service time in minutes
0	1.65	21- 25	9.45
1	3.00	26- 30	10.45
2	3.50	31- 35	11.15
3	4.00	36- 40	12.00
4	4.50	41- 45	12.85
5	5.00	46- 50	13.65
6	5.50	51- 60	14.75
7	5.75	61- 70	16.20
8	6.00	71- 80	17.65
9	6.50	81- 90	19.10
10	6.75	91-100	20.60
11	7.00	101-110	21.88
12	7.25	111-120	23.13
13	7.50	121-130	24.38
14	7.75	131-140	25.60
15	8.00	141-150	26.63
16	8.25	151-160	27.75
17	8.50	161-170	28.88
18	8.75	171-180	29.80
19	9.00	181-190	30.60
20	9.25	191-200	31.40

Source: Time studies conducted by the Wisconsin State Department of Agriculture, Department of Agricultural Economics, University of Wisconsin, and cooperating dairies during 1963. This time data is only for retail food stores.

TABLE 2.—MODIFIED DROP SERVICE—SERVICE TIME PER DELIVERY

Number of units	Service time in minutes	Number of units	Service time in minutes
1- 10	2.50	151- 200	19.90
11- 20	3.50	201- 250	24.00
21- 30	4.75	251- 300	26.00
31- 40	6.00	301- 350	28.50
41- 50	8.00	351- 400	30.50
51- 60	9.00	401- 500	35.25
61- 70	10.25	501- 600	40.50
71- 80	11.50	601- 700	44.75
81- 90	12.30	701- 800	48.50
91-100	13.00	801- 900	51.50
101-150	15.90	901-1000	53.50

Source: Time studies conducted by the Wisconsin State Department of Agriculture, Department of Agricultural Economics, University of Wisconsin, and cooperating dairies during 1963. This time data is only for retail food stores.

652. The time required for full service deliveries on Table 1 above only goes up to the volume bracket of 200 units per delivery. The time for all brackets, including those in excess of 200 units per delivery are found on the table prepared by Dr. Solverson, RA&PX 8. That portion of Table 8 concerned with full service delivery above the 200 unit bracket is set out here for the Court's convenience.

No. of Units	No. of Minutes Per Delivery (Full Service)[1]	No. of Minutes Per Unit (Full Service)[2]
201-250	35.25	.157
251-300	37.95	.138
301-350	41.32	.127
351-400	44.02	.117
401-500	50.44	.112
501-600	57.52	.105
601-700	63.26	.097
701-800	68.32	.091
801-900	72.38	.085
901-1000	75.08	.079

[1] Source (brackets 201-250 through 901-1000): Estimated by using Modified Drop Service Time as a predictor. The formula used was: Full Service Time per delivery in minutes = 2.85 + 1.35 times Modified Drop Time (see graph 1) (RA&PX 8).

[2] No. of Minutes Per Unit = No. of Minutes Per Delivery divided by the midpoint of the bracket.

653. The serving time per point for A&P and each of the allegedly injured customers can be determined by use of these tables. As is stated above, the points per delivery to A&P were 441.7 (A&P Finding 635). For a customer receiving modified drop service, the service received by A&P (A&P Finding 651), the serving time is given in Table 2 in A&P Finding 651 as 35.25 minutes. The serving time for each complaint customer is obtained in the identical manner, except that the figure is taken from Table 1 in A&P Finding 651 or from the expanded version of Table 1 prepared by Dr. Solverson and set out above in A&P Finding 652. The time required to serve A&P, and each of the complaint customers is as follows:

	CUSTOMER	A POINTS PER DEL (1)	B SVNG TIME (MIN) PER DEL
1	MR. CENTRAL	482.164	50.44
2	MAYFAIR FOODS	437.382	50.44
3	JAMES COX	365.687	44.02
4	MISICKA'S FOODS	250.066	35.25
5	JOS. MICHALOWSKI	282.311	37.95
6	CARDINAL STORES	236.070	35.25
7	MADISON LAVEIGNE	203.989	35.25
8	BEL PARK FOODS	183.209	30.60
9	GREENVIEW FRUIT	180.200	29.80
10	STRICKLAND #159	184.287	30.60
11	ROBERT BATTALI	214.411	35.25
12	EDWARD MARSZAICK	184.207	30.60
13	BILL'S MARKET #194	176.732	29.80
14	GENE'S FOOD SHOP	210.720	35.25
15	SPOT LITE MARKET	203.300	35.25
16	THERESA CRISPINO	173.221	29.80
17	FOREST FOOD MART	158.906	27.75
18	STRICKLAND #256	135.658	25.60
19	CONGRESS FOOD	156.338	27.75
20	FLOOM BROS.	151.404	27.75
21	JOS. BERLIN & SON	136.038	25.60
22	BRUNO NALEPA	151.397	27.75
23	BLANCHE'S FOODS	142.754	26.63
24	EDWARD TRUTY	146.534	26.63
25	BARNEY TRAINOR	129.436	24.38
26	BILL'S MARKET #002	123.721	24.38
27	PETERSON'S FOODS	115.786	23.13
28	JOE MILECKI	116.618	23.13
	A & P	441.700	35.25

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(1) The points per delivery for each of the complaint customers is obtained from A&P Finding ~~634~~. The points per delivery to A&P are given in A&P Finding 635.

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Fixed or Common Time

654. In addition to serving time, the Wisconsin Manual requires that a fixed time or common time must also be determined. Under the procedure recommended in the Wisconsin Manual, this is determined by subtracting all serving time for all customers on all routes from the total operating time for those routes. The total number of O'Hare regular wholesale route days for March, 1966 was 464 (RA&PX 170, p. 25; RA&PX 233, p. 12). Thus the total operating time for all regular wholesale routes on O'Hare in March, 1966 was 222,720 minutes - 464 route days x 480 min. (A&P Finding 649).

655. The total serving minutes time in March, 1966 is then the aggregation of the serving minutes per stop for A&P and all the allegedly injured customers, as set out in A&P Finding 653 above, multiplied by the number of deliveries made in the month to each of those customers, plus the total serving time necessary to serve all the other customers on those routes. A&P and all of the allegedly injured customers received 27 deliveries in March, 1966, except Gene's Food Shop which received 23 (RA&PX 233, p. 69). The total serving minutes for each of these customers is, therefore:

	A SERVING TIME PER DELIVERY A&P FINDING 653	B DELIVERIES PER MONTH(*)	C SERVING MINUTES PER MONTH (A X B)
GROCERY STORE CUSTOMERS			
86 A&P STORES	35.250	2322	81850.500
MR. CENTRAL	50.440	27	1361.880
MAYFAIR FOODS	50.440	27	1361.880
JAMES COX	44.020	27	1188.540
MISICKA'S FOODS	35.250	27	951.750
JOS. MICHALOWSKI	37.950	27	1024.650
CARDINAL STORES	35.250	27	951.750
MADISON LAVEIGNE	35.250	27	951.750
BEL PARK FOODS	30.600	27	826.200
GREENVIEW FRUIT	29.800	27	804.600
STRICKLAND #159	30.600	27	826.200
ROBERT BATTALI	35.250	27	951.750
EDWARD MARSZAICK	30.600	27	826.200
BILL'S MARKET #194	29.800	27	804.600
GENE'S FOOD SHOP	35.250	23	810.750
SPOT LITE MARKET	35.250	27	951.750
THERESA CRISPINO	29.800	27	804.600
FOREST FOOD MART	27.750	27	749.250
STRICKLAND #256	25.600	27	691.200
CONGRESS FOOD	27.750	27	749.250
FLOOM BROS.	27.750	27	749.250
JOS. BERLIN & SON	25.600	27	591.200
BRUNO NALEPA	27.750	27	749.250
BLANCHE'S FOODS	26.630	27	719.010
EDWARD TRUTY	26.630	27	719.010
BARNEY TRAINOR	24.380	27	658.260
BILL'S MARKET #002	24.380	27	658.260
PETERSONS'S FOODS	23.130	27	624.510
JOE MILECKI	23.130	27	624.510
Total			105,632.31

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* 86 A&P stores (RA&PX 180, line 1, col. 1) x 27 = 2,322.

656. The serving time to serve all of the other customers on the O'Hare regular wholesale routes can be obtained from the data found on RA&PX 180 (final version RA&PX 233, p. 8). From this document we see that there were 15 non-A&P and non-complaint store customers who received limited service (RA&PX 180, line 1, col. 7; RA&PX 233, p. 8, line 1, col. 7). These stores received a total of 26,609 points (RA&PX 180, line 8, col. 7; RA&PX 233, p. 8, line 8, col. 7). They received a total of 405 deliveries (RA&PX 180, line 3, col. 7, RA&PX 233, p. 8, line 3. col. 7), for an average of 65.7 points per delivery (26,609 ÷ 405). The average serving minutes per delivery for these customers is thus 10.25 minutes (See A&P Finding 651, Table 2.) The total serving minutes required to serve these 15 limited service customers in March, 1966 is, therefore, determined to be 4151.25 min. (10.25 minutes per delivery x 405 deliveries).

657. In addition to the limited service customers, there were 72 other stores receiving full service on the O'Hare routes in question (RA&PX 180, line 1, col. 13; RA&PX 233, p. 8, line 1, col. 13). These stores received a total of 233,518 points (RA&PX 180, line 8, col. 13; RA&PX 233, p. 8, line 8, col. 13). 28 of these 72 stores are the allegedly injured customers (see A&P

Finding 634). The allegedly injured customers received 151,235.865 points during the month (see A&P Finding 634). Thus the remaining 44 store customers who received full service delivery received a total of 82,282 points (233,518 - 151,236). All 72 customers received 1,955 deliveries in March, 1966 (RA&PX 180, line 3, col. 13, RA&PX 233, p. 8, line 3, col. 13). The 28 allegedly injured customers received 752 deliveries (27 customers x 27 deliveries per customer = 729 customers + Gene's Food Shop with 23 deliveries = 752 deliveries). The 44 other full service stores, therefore, received 1,203 deliveries in March, 1966 (1,955 - 752), or an average of 68.5 points per delivery (82,282 ÷ 1,203). The serving minutes per customer are, therefore, 16.20 minutes per delivery (A&P Finding 651, Table 1). The total serving minutes to serve these 44 stores is thus 19,488.6 (16.20 serving min. per delivery x 1,203 deliveries).

658. There were 61 non-store customers on the O'Hare wholesale routes (RA&PX 180, line 1, col. 16; RA&PX 233, p. 8, line 1, col. 16). Thirty-nine of these were schools (RA&PX 180, line 1, col. 14; RA&PX 233, p. 8, line 1, col. 14) who received 302,949 points (RA&PX 180, line 8, col. 14; RA&PX 233, p. 8, line 8, col. 14) in 821 deli-

veries (RA&PX 180, line 3, col. 14; RA&PX 233, p. 8, line 3, col. 14), or an average of 369 points per delivery (302,949 ÷ 821 = 369). There were twenty-two other non-store customers (RA&PX 180, line 1, col. 15; RA&PX 233, p. 8, line 1, col. 15) who received 108,108 points (RA&PX 180, line 8, col. 15; RA&PX 233, p. 8, line 8, col. 15) in 546 deliveries (RA&PX 180, line 3, col. 15; RA&PX 233, p. 8, line 3, col. 15), or an average of 198 points per stop (108,108 ÷ 546 = 198). While the Tables in RA&PX 9 apply only to serving time requirements for grocery stores, the record also includes the Thesis (RA&PX 11) of Complaint Counsel's expert witness, Dr. Lyle Solverson, an author of the Wisconsin Special Bulletin No. 83 (RA&PX 9). Page 206 of his thesis (RA&PX 11) provides a table of serving time standards for Full Service to Restaurants. These standards are applicable to the schools and other non-store customers on the O'Hare routes, since the type of operation conducted at these facilities for which milk is delivered is a restaurant or cafeteria type business. That table is set out here for the convenience of the Court.

APPENDIX TABLE 4.--Wholesale Fluid Milk Delivery.
Restaurant Full Service--Service Time
Per Delivery

Number of Units	Service Time in Minutes
1- 5	6.37
6- 10	7.79
11- 15	8.50
16- 20	9.32
21- 30	10.47
31- 40	11.51
41- 50	13.00
51- 60	14.00
61- 70	15.00
71- 80	16.00
81- 90	17.00
91-100	18.00
101-125	19.50
126-150	21.50
151-175	23.25
176-200	25.00
201-250	27.50
251-300	30.00
301-350	32.00
351-400	34.00
401-450	36.00
451-500	37.50

Source: Time Studies Conducted by the Wisconsin State Department of Agriculture and the Department of Agricultural Economics, The University of Wisconsin, from 1963 to 1965.

659. The serving time standard per delivery for schools can thus be read directly off the volume bracket 351-400 and is seen to be 34.0 minutes. The serving time standard per delivery for the other non-store customers is read from the 176-200 bracket, and is 25.0 minutes per delivery. The serving time per month required for non-stores is thus 27,914 minutes for schools (821 x 34.0 minutes) plus 13,650 minutes for other non-store customers (546 x 25.0 minutes). The total serving time to all non-store customers is thus determined to be 41,564 minutes per month (27,914 + 13,650).*

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* It should be noted that approximately this same result would be reached if we assume that the average delivery time per point to the non-store customers is the same as the average delivery time per point to the store customers. The total points delivered to non-store customers in the month of March, 1966 was 411,057 (RA&PX 180, line 8, col. 16). Dividing the 41,564 minutes derived above by 411,057 we get .0111 minutes per point. The total points delivered to all grocery store customers in the month was 1,285,676 points [1,025,549 points to A&P stores (RA&PX 180, line 8, col. 1) + 26,609 points to the 15 independent stores receiving limited service (RA&PX 184, line 8, col. 8) + 233,518 points to the non-A&P full-service customers (RA&PX 180, line 8, col. 13)]. The total serving time to store customers in the month was 129,272.16 minutes (105,632.31 + 4,151.25 + 19,488.6; A&P Findings 655, 656, 657, supra). Thus, the average serving minutes per point to these customers was .1005 minutes per point. If the .1005 minutes were applied to the points delivered to non-store customers (411,057) to estimate the total serving time for delivery to them, that total time would be increased from 41,564 minutes to 41,311. The only purpose of deriving the serving time to the non-store customers is to permit the calculation of total serving time to all customers, and, in turn, the total constant time. The only relevant effect of substituting 41,311 for 41,564 would be to decrease total serving

(Footnote continued on next page)

660. The total serving time required to serve the grocery store customers served on the O'Hare wholesale routes was 129,272.160 minutes. This is the sum of the serving time for A&P stores and the 28 complaint customers (105,632.31 minutes, A&P Finding 655), the 15 other O'Hare route customers who received limited service (4,151.25 minutes, A&P Finding 656), and the 44 other O'Hare route grocery store customers who received full service (19,488.6 minutes, A&P Finding 657).

(Footnote continued from previous page)

time from 170,836 to 170,583, a decrease of only .15 percent. It is not surprising that the average minutes per point for deliveries to the non-store customers is closely comparable to the average minutes per point for deliveries to store customers. First, the points per delivery are not far apart. Thus, the points per delivery for non-store customers average 301 [(302,949 school points + 108,108 non-school points) ÷ (821 school deliveries + 546 non-school deliveries)], while the points per delivery for store customers average 275 [1,285,676 store points ÷ 2,322 A&P deliveries + 405 limited service other store deliveries + 1,955 full service other store deliveries)]. Moreover, the Solverson time standard for restaurant service falls between the full service standard and limited service standard in such a way as to indicate that the average serving time for the non-store customers should be about the same as the average serving time for the store customers on the O'Hare routes. If we look at the 251-300 unit bracket, for example, we see that full service requires 37.95 minutes per delivery (A&P Finding 652, supra), modified drop service requires 26 minutes per delivery (A&P Finding 651, supra) and restaurant service requires 30.00 minutes per delivery (A&P Finding 658). 75% of the points delivered on the O'Hare branch to stores were limited service deliveries to A&P and 15 other store customers. (Compare RA&PX 180, line 8, with RA&PX 233, p. 8, line 8). Thus, averaging the limited service with the full service deliveries, we get 28.99 minutes per delivery [(.75 x 26) + (.25 x 37.950)], quite close to the 30.00 minutes shown by Solverson for restaurants in this bracket.

661. The total serving time to all of the customers served by the O'Hare Wholesale Routes was 170,836.16 minutes, *i.e.*, 129,272.160 minutes for Grocery Store Customers (A&P Finding 660), plus 41,564 minutes for Non-Store Customers (A&P Finding 659).

662. The total common time is, therefore, found by subtracting the total serving time of 170,836.16 minutes (A&P Finding 661) from 222,720 total route minutes (A&P Finding 654), and equals 51,883.84 minutes.

663. The total common cost is, therefore, obtained by multiplying the total common time, 51,883.84 minutes (A&P Finding 662) by the cost per route minute of $.22604 (A&P Finding 649) to obtain a total common cost of $11,727.823.

664. The common cost per delivery is determined by dividing the total common cost of $11,272.823 (A&P Finding 663) by 6,049, the total number of deliveries made on the O'Hare regular wholesale routes in March, 1966 (RA&PX 180, line 3, col. 17; RA&PX 233, p. 8, line 3, col. 17). The common cost per delivery is thus determined to be $1.938804.

665. The specific cost per delivery for each customer is determined by multiplying the serving time per delivery

(A&P Finding 653) by the cost per minute (A&P Finding 649).

666. The total cost per delivery for each customer is the sum of the specific cost per delivery to the customer and the common cost per delivery (RA&PX 9, p. 6).

667. The delivery cost per point can then be determined for each customer by simply dividing the total cost per delivery, by the number of points per delivery (RA&PX 9, p. 8). The calculation of delivery cost per point for each of the allegedly injured customers and for A&P is as follows:

CUSTOMER	A SERVING TIME PER DELIVERY(1)	B COST PER MINUTE(2)	C SPECIFIC COST PER DELIVERY(3)	D COMMON COST PER DELIVERY(4)	E TOTAL COST PER DELIVERY(5)	F POINTS PER DELIVERY(6)	G DELIVERY COST PER POINT(7)
Mr. Central	50.44	.22604	$11.401457	$1.938804	13.340261	482.164	.027667
Mayfair Foods	50.44	.22604	11.401457	1.938804	13.340261	437.382	.030500
James Cox	44.02	.22604	9.950281	1.938804	11.889085	365.687	.032512
Misicka's Foods	35.25	.22604	7.967910	1.938804	9.906714	250.066	.039616
Jos. Michalowski	37.95	.22604	8.578218	1.938804	10.517022	282.311	.037253
Cardinal Stores	35.25	.22604	7.967910	1.938804	9.906714	236.070	.041965
Madison LaVeigne	35.25	.22604	7.967910	1.938804	9.906714	203.989	.048565
Bel Park Foods	30.60	.22604	6.916824	1.938804	8.855628	183.209	.048336
Greenview Fruit	29.80	.22604	6.735992	1.938804	8.674796	180.200	.048140
Strickland #159	30.60	.22604	6.916824	1.938804	8.855628	184.287	.048053
Robert Battali	35.25	.22604	7.967910	1.938804	9.906714	214.411	.046204
Edward Marszaick	30.60	.22604	6.916824	1.938804	8.855628	184.207	.048074
Bill's Market #194	29.80	.22604	6.735992	1.938804	8.674796	176.732	.049084
Gene's Food Shop	35.25	.22604	7.967910	1.938804	9.906714	210.720	.047014
Spot Lite Market	35.25	.22604	7.967910	1.938804	9.906714	203.300	.048730
Theresa Crispino	29.80	.22604	6.735992	1.938804	8.674796	173.221	.050079
Forest Food Mart	27.75	.22604	6.272610	1.938804	8.211414	158.906	.051675
Strickland #256	25.60	.22604	5.786624	1.938804	7.725428	135.658	.056948
Congress Food	27.75	.22604	6.272610	1.938804	8.211414	156.338	.052523
Floom Bros.	27.75	.22604	6.272610	1.938804	8.211414	151.404	.054235
Jos. Berlin & Son	25.60	.22604	5.786624	1.938804	7.725428	136.038	.056789
Bruno Nalepa	27.75	.22604	6.272610	1.938804	8.211414	151.397	.054238
Blanche's Foods	26.63	.22604	6.019445	1.938804	7.958249	142.768	.055743
Edward Truty	26.63	.22604	6.019445	1.938804	7.958249	146.534	.054310
Barney Trainor	24.38	.22604	5.510855	1.938804	7.449659	129.436	.057555
Bill's Market #002	24.38	.22604	5.510855	1.938804	7.449659	123.721	.060213
Peterson's Foods	23.13	.22604	5.228305	1.938804	7.167109	115.786	.061900
Joe Milecki	23.13	.22604	5.228305	1.938804	7.167109	116.618	.061458
A & P	35.25	.22604	7.967910	1.938804	9.906714	441.700	.022429

(1) A&P Finding 653
(2) A&P Finding 649
(3) Serving Time (Column A) times Cost per Minute (Column B)
(4) A&P Finding 664
(5) Specific Cost (Column C) plus Common Cost (Column D)
(6) A&P Finding 634 for Complaint Customers. RA&PX 233, p. 8, for A&P
(7) Total Cost per Delivery (Column E) divided by Points per Delivery (Column F)

668. The additional delivery cost per point incurred by Borden to serve each of the allegedly injured customers may be determined by subtracting Borden's cost of delivery per point to A&P, $.022429 (A&P Finding 667) from the cost of delivery per point incurred by Borden to deliver to each allegedly injured customer, as determined in A&P Finding 667. The results of this calculation for each of the allegedly injured customers is as follows:

	A	B	C
	DELIVERY COST PER POINT		
CUSTOMER	COMPLAINT CUSTOMER(1)	A&P (2)	ADDITIONAL COST INCURRED FOR COMPLAINT CUSTOMER(3)
Mr. Central	.027667	.022429	.005238
Mayfair Foods	.030500	.022429	.008071
James Cox	.032512	.022429	.010083
Misicka's Foods	.039616	.022429	.017187
Jos.Michalowski	.037253	.022429	.014824
Cardinal Stores	.041965	.022429	.019536
Madison LaVeigne	.048565	.022429	.026136
Bel Park Foods	.048336	.022429	.025907
Greenview Fruit	.048140	.022429	.025711
Strickland #159	.048053	.022429	.025624
Robert Battali	.046204	.022429	.023775
Edward Marszaick	.048074	.022429	.025645
Bill's Market #194	.049084	.022429	.026655
Gene's Food Shop	.047014	.022429	.024585
Spot Lite Market	.048730	.022429	.026301
Theresa Crispino	.050079	.022429	.027650
Forest Food Mart	.051675	.022429	.029246
Strickland #256	.056948	.022429	.034519
Congress Food	.052523	.022429	.030094
Floom Bros.	.054235	.022429	.031806
Jos. Berlin & Son	.056789	.022429	.034360
Bruno Nalepa	.054238	.022429	.031809
Blanche's Foods	.055743	.022429	.033314
Edward Truty	.054310	.022429	.031881
Barney Trainor	.057555	.022429	.035126
Bill's Market #002	.060213	.022429	.037784
Peterson's Foods	.061900	.022429	.039471
Joe Milecki	.061458	.022429	.039029

(1) A&P Finding 667 Customer Delivery Cost
(2) A&P Finding 667, A&P Delivery Cost
(3) Column A - Column B

669. In addition to their criticisms of Mr. Havemeyer's allocation of the drivers' commissions and building and automotive expenses, which we have demonstrated to be without merit (A&P Findings 644 to 648), Complaint Counsel have leveled several additional attacks on Mr. Havemeyer's allocation of delivery costs.

670. First, Complaint Counsel contend that Mr. Havemeyer's division of stores into limited service and full service categories is "arbitrary and unfounded" (C.C. Finding 15(b)(vi)). This criticism is unwarranted.

671. It is obvious that some such division of stores into categories must be made. The Government's own witness, Dr. Lyle Solverson, testified that he would classify delivery systems in three categories: full service, modified drop service, and drop service (Solverson Tr. 1547-48). He also indicated that these categories would be applicable nationwide (Tr. 1556).

672. Mr. Havemeyer reached his conclusions after a careful analysis of the testimony of the various witnesses, Borden's route books, and the stipulations of the parties.

673. The record clearly establishes that all of the customers treated by Mr. Havemeyer as receiving full service delivery did, in fact, enjoy such service. Mr. Havemeyer

explained in some detail the sources on which he relied in reaching his conclusions on that score (Tr. 8952-58). He pointed out that in the case of Mayfair, for example, the Borden driver performed all functions normally associated with full service - i.e., the Borden driver delivered to the dairy case, checked the date of stock in the case, removed out-of-date merchandise and rotated the stock in the dairy case, and that Mayfair received special deliveries (Tr. 8953-54). In the case of James Cox, the drivers made deliveries to the dairy case, made out the order, rotated the merchandise and removed out-of-date merchandise (Tr. 8954-55). None of the eight O'Hare customers listed on the stipulation of services (RA&PX 35) received service sufficiently different from Mayfair and James Cox to warrant a conclusion that their delivery services should be classified in any way other than full service (Tr. 8956-57). The route book notations, as supplemented by the testimony of Joseph Pergler, indicated that all the other customers likewise received full service (Tr. 8957-58). Mr. Pergler, in fact, testified that all the non-A&P customers on the O'Hare Branch received full service delivery (Tr. 5651-52). Thus, Mr. Havemeyer's treatment of these customers as full service customers was not based on some arbitrary assumption or classification, but on the evidence in the case.

674. Complaint Counsel apparently contend that Mr. Havemeyer should have analyzed each work element involved in full service delivery to each of the 28 complaint customers, studied each element separately, and established different categories for each customer where there was the slightest difference in the service received. This contention is obviously absurd. As indicated, Complaint Counsel's own witness, Dr. Solverson, indicated that he would divide the customers into only three categories. Further, the record clearly establishes that despite any minor differences, the allegedly injured customers all received essentially the same services. Finally, at this late date, considering the records available, Mr. Havemeyer could not have prepared a more detailed study.

675. Complaint Counsel's position on this question amounts to a demand that respondent A&P separately determine the precise time required for delivery at each stop. This, their own witness, Dr. Solverson, testified is "very difficult to do" (Solverson Tr. 1582). Indeed, the State of Wisconsin attempted to do so, but abandoned the effort (Solverson Tr. 1582). For Complaint Counsel to here urge that a buyer must do so years after the events in question is preposterous. Mr. Havemeyer made a reasonable application of the available evidence and used reasonable classifications in allocating costs with respect to the delivery function.

676. Complaint Counsel contend (C.C. Finding 15(b)(vi)) that Mr. Havemeyer should have treated as full service the nineteen A&P stores that received "route bookkeeping" service, by which Complaint Counsel apparently mean the notation in the Borden driver's route book of the quantities delivered. Such treatment would be totally unwarranted.

677. First, it should be noted that the additional time required to perform this minor function for nineteen of the 198 A&P stores in the Chicago area (CX 22A) is minuscule and would have a totally negligible affect on Mr. Havemeyer's conclusions. We also note that this is not a "service" to A&P; it is only a matter of the routeman's record-keeping for his own purposes.

678. More important, it is undisputed that no such entries were supposed to be made for the A&P stores. Joseph Pergler, Borden's O'Hare branch manager, testified that the drivers were instructed to make no bookkeeping entries for any of the A&P stores (Tr. 5652). Mr. Pergler testified (Tr. 5745) that some drivers occasionally failed to observe their instructions. Thus, to the extent such entries were made, it was done contrary to instructions received from Borden management. A&P may only be held responsible for negotiating a

proper contract, and should not be held responsible for occasional deviations from the contract by Borden personnel.

679. Furthermore, it was Complaint Counsel that initially decided to treat all the A&P stores together. If they now want to analyze individual A&P stores separately, they must do so consistently, and compare each allegedly injured customer with the specific competing A&P store.

680. In their proposed Finding 15(b)(ii), Complaint Counsel argue, in essence, that A&P cannot be allowed to cost justify on the basis of the difference in service provided to it and Borden's other customers, because, A&P, as a buyer of milk products, has the responsibility of ascertaining that the seller has offered comparable services and prices to all other buyers. As we demonstrate (A&P Findings 955-58, pp. 922-23, infra), this is not the law. In any event, A&P cannot be charged with knowledge of Borden's offers to other customers. Of all the allegedly injured customers who testified in these proceedings, only Gintert was aware that Borden offered a discount for pre-ordering, and his store switched to pre-ordering in 1966 or 1967 [Gintert (Wilco) (Tr. 2522-2523); Barnes (Wally's) (Tr. 3913); Lasorso (Mayfair) (Tr. 2699-2700); James Cox (Tr. 3998); Barney (Model) (Tr. 3818);

Kristoff (Burger) (Tr. 2330); Minard (Tittle) (Tr. 3208)]. If none of these customers were aware of Borden's pricing practices, then A&P can surely not be charged with such knowledge. Furthermore, Borden was subject to an order against price discrimination in milk sales in the Chicago area entered on April 24, 1963 by Chief Judge Campbell of the United States District Court for the Northern District of Illinois. (See Order dated November 27, 1973 Taking Official Notice of Court Judgment.) A&P should have been entitled to assume that Borden would comply with this court order.

681. Complaint Counsel contend that Mr. Havemeyer should have organized his study so as to compare A&P's purchases of the eleven private label items with the allegedly injured customers' purchases of those items alone (C.C. Finding 15(b)(viii)). What Complaint Counsel fail to acknowledge is that Mr. Havemeyer prepared his study to respond to CX 183A-D, and performed the same comparisons as did the Complaint Counsel's accountant. That Mr. Havemeyer analyzed the situation in the method selected by Complaint Counsel is sufficient; Complaint Counsel may not be heard to complain that a method of comparison they themselves selected is unreasonable.

682. The physical delivery cost differences set out in these findings are reasonable estimates of Borden's savings in serving A&P. They should be accepted.

4. Branch Clerical Cost

683. Since A&P took larger deliveries than most of the allegedly injured customers on the O'Hare route, it is to be expected that the branch clerical cost per point would be less than that for most of these other customers. It is obvious, for example, that the office work in connection with a delivery of 200 quarts of milk is not twice the work for a delivery of 100 quarts.

684. RA&PX 164 is a flow chart which shows the development of the branch clerical costs (Havemeyer Tr. 8221-22). From Borden accounting records, Case and Company first determined the branch clerical expenses at the O'Hare Branch for March, 1966 applicable to the wholesale routes, from which they excluded the amount applicable to bulk customers and schools who were served on those routes to determine the amount applicable to the regular (store) wholesale business (Havemeyer Tr. 8222; RA&PX 164). They then determined the number of O'Hare regular wholesale delivery tickets in March, 1966 to obtain a branch clerical expense per delivery (Havemeyer Tr. 8222). The branch

clerical cost per delivery was in turn divided by the number of points per delivery for each customer for whom the analysis was performed to determine a branch clerical cost per point for the customer (Havemeyer Tr. 8222-23).

685. Complaint Counsel criticize this method of allocation on the ground that the clerical branch costs involve functions other than the handling of delivery tickets, and they refer specifically to inventory control, maintenance, operation of the vehicles, payroll and the selling function (C.C. Finding 15(c)(i)). Had the methodology suggested by Complaint Counsel been employed, the result would have been to increase the cost justification (Havemeyer Tr. 9695). Mr. Havemeyer noted that there was some clerical cost associated with the selling function. Had that portion of branch clerical associated with selling been allocated to the selling function, none of that cost would have gone to A&P as there was no selling cost associated with A&P (Havemeyer Tr. 9695). If clerical costs associated with the delivery function had been allocated to that function, the result would, obviously, have been to increase the delivery costs. Since the delivery cost approach employed by Mr. Havemeyer resulted in a cost advantage to A&P, an increase

in delivery costs would have increased this delivery cost advantage (Havemeyer Tr. 9695-96). Clerical costs associated with inventory control would have been allocated to customers on the basis of truck loading. Since the allocation of truck loading costs resulted in a cost difference in favor of A&P, an increase in truck loading costs would have increased the difference (Havemeyer Tr. 9695-96).

686. As Mr. Havemeyer indicated, clerical costs associated with the maintenance payroll of records would have been allocated to other functions such as truck loading, sales, and delivery, particularly truck loading and delivery, since most of the personnel were loaders and deliverymen. Thus, this method of allocation would have increased the cost justification associated with those functions. Any clerical costs associated with vehicle maintenance and vehicle records would have been charged through the delivery function and increased the cost justification associated with that function (Havemeyer Tr. 9696-97).

687. It should also be noted that while the methodology employed in the allocation of clerical expenses was based on the assumption that the same type of clerical services were received by all customers, including A&P, certain clerical functions required for non-A&P customers were

not required for A&P. Those services were those associated with the rebate system, with the handling of out-of-date merchandise, with the collection of cash and checks and accounting for the same and comparing them against the bill, and with special deliveries - which under the private label contract A&P was not supposed to get. Had the clerical time been broken down to distinguish between clerical functions associated with A&P and clerical functions associated with non-A&P stores, less would have been charged to A&P and more to non-A&P stores (Havemeyer Tr. 9697-98).

688. Thus, while Complaint Counsel criticize the method of allocating clerical costs, the method employed has resulted in a bias against A&P.

689. In any event, the method chosen by Mr. Havemeyer was proper. It is appropriate to associate a cost with the principal function to which it is related; number of deliveries or delivery tickets meets that test.

690. Borden's branch clerical costs at O'Hare for the month of March, 1966 were obtained from a Borden accounting ledger, account 723-004, identified as O'Hare Office Expense and introduced into the record as a part of RA&PX 72 (Havemeyer Tr. 8472). As with the O'Hare truck

loading cost, the O'Hare Branch clerical cost was distributed among the categories of milk sales for which the O'Hare Branch performed clerical services. In the case of branch clerical costs, however, the distribution was among regular wholesale, vendor, bulk wholesale, and counter sales. No allocation was made to retail sales (Havemeyer Tr. 8472).

691. An allocation of a portion of the branch clerical costs to counter sales business was required because, while these items did not physically pass through the O'Hare Branch, the Borden accounting system credited these sales to O'Hare, which handled the bookkeeping (Pergler Tr. 5631-32, 5693). Borden's records charge the office costs of these sales against the O'Hare Branch (RA&PX 70, line entitled "O'Hare Office Cost").

692. In spite of Complaint Counsel's claim that Mr. Havemeyer's failure to allocate any portion of O'Hare clerical expense to retail sales was improper (C.C. Finding 15(c)(iii)), the record clearly supports Mr. Havemeyer. An examination of the Borden ledger for account 723-004 [the O'Hare Branch Clerical Costs (A&P Finding 690)] reveals that it is captioned in the upper left-hand corner "Region 7 Chicago Metro, Location 723, Account 044 Office Expense" (RA&PX 70). Location 723 is identified as "Irving Park-Whlse

Rts. (O'Hare Wholesale)" (RA&PX 68). Thus, one would not expect to find retail expenses in a location 723 account. Accordingly, none of the office expense of operating the O'Hare retail routes would have been entered in account 004 at location 723, and accordingly none of the branch clerical expenses were allocated to those routes.

693. The allocation was made among regular wholesale, vendor, bulk wholesale, and counter sales on the basis of the points delivered in each category. Complaint Counsel protest that this initial allocation on a per point basis is inconsistent with Mr. Havemeyer's subsequent allocation of the portion of the branch clerical expense attributable to the regular wholesale business (C.C. Finding 15(c)(ii). Mr. Havemeyer was required to make the initial allocation of clerical expenses on a per point basis because no information was available which support any other method of allocation. In fact, Mr. Havemeyer's use of volume as a basis for allocating branch clerical costs among these various categories of business probably resulted in the allocation of too much to the categories other than wholesale store routes, thereby diminishing the amount to be allocated among A&P and the allegedly injured customers and thereby reducing the differential. The one Borden accounting record

which shows an allocation of the branch office expense, RA&PX 70, clearly demonstrates this. Thus, only $66 out of a total of $5,754 costs for May, 1965, or only slightly more than 1%, was allocated by Borden to counter sales, whereas the same document shows that counter sales were 980,074 points out of total O'Hare sales of 4,641,439 points, or over 21% of total sales (RA&PX 70). Likewise, wholesale business, while accounting for only 1,878,004 points, or approximately 40% of total sales, was charged with $2,923 or almost 51% of the total branch clerical expense (RA&PX 70). In Mr. Havemeyer's analysis, the regular wholesale business was allocated significantly less than half O'Hare's branch clerical cost (RA&PX 233, p. 11).

694. The branch clerical cost per delivery ticket was determined to be 72.5¢ (Havemeyer Tr. 8478-79; RA&PX 233, p. 11). In the comparison of Borden's costs of providing A&P's total milk and dairy requirements (both private and Borden label) with its costs of servicing the allegedly injured customers, the cost of the branch clerical expense per point was obtained, for both A&P and the other customer, by dividing this cost per delivery of 72.5¢ by the number of points per delivery (Havemeyer Tr. 8478-81).

695. In the calculation comparing Borden's costs of delivering only private label milk to A&P against its costs of delivering all products to the other customers, it was necessary to apportion the branch clerical cost between the Borden label and the private label items as shown on the bottom half of page 48 of RA&PX 170 (Havemeyer Tr. 8479). The apportionment was based on the ratio of lines on the A&P delivery ticket for each product - i.e., 11 lines on the delivery ticket were for private label items and 27 were for Borden label items so that 11/38 or 28.95% was allocated to private label, and 27/38 or 71.05% was allocated to Borden label (Havemeyer Tr. 8479; RA&PX 233, p. 11). The use of these ratios for apportioning the office expense between the private label and Borden label products delivered to A&P does not involve an assumption that all 38 lines were actually used on each delivery ticket. The assumption is only that the relationship between the private label items taken and non-private label items taken would be approximately in this 30-70 relationship (Havemeyer Tr. 8485). For example, instead of taking 11 private label items every day, A&P might have bought only 9 items, and instead of 27 Borden label items only 24, but the relationship between the two labels would have been more or less constant (Havemeyer Tr. 8485-86). This assumption is founded on a review of the route book pages where the data was available (Havemeyer Tr. 8486). No other or better method of allocation was available.

696. In spite of the objections of Complaint Counsel (C.C. Finding 15(c)(vii)), the Advisory Committee on Cost Justification, in its Report to The Federal Trade Commission, dated February, 1956, expressly recommended that the sales accounting function be allocated on the basis of the "number of orders or invoices or invoice lines, number of transactions, number of accounts" *id*., emphasis added. In any event, the necessity of making the allocation was imposed by the nature of the price difference comparisons Complaint Counsel saw fit to make. Respondent did no more than respond to those comparisons. Any arbitrariness in the allocation of the branch clerical costs between Borden and private label milk is the inevitable consequence of Complaint Counsel's choice and is but one more reason for rejecting the O'Hare price comparisons they presented in CX 183A-D.

697. The 28.95% of the 72.5¢ branch clerical cost per delivery, or 21.01¢, which is allocable to private label was then divided by the average number of private label points per delivery to determine a branch clerical cost per point (Havemeyer Tr. 8481-2).

698. It is important to recognize that the branch clerical cost was not allocated on the basis of delivery tickets but rather on the number of deliveries (Havemeyer Tr.

8478). The delivery ticket was used only to allocate the delivery expenses between Borden label and private label deliveries to A&P. Allocation of branch clerical costs on the basis of number of deliveries is appropriate because such costs tend to be incurred in proportion to number of deliveries rather than points delivered, dollar volume, or some other variable. Thus, it takes "no more measurable time to multiply 300 by a price as it does to multiply 13 by a price" (Havemeyer Tr. 8483).

699. The allocation of branch clerical cost on a per delivery basis is in no way impaired, as Complaint Counsel allege (C.C. Finding 15(c)(iv)), by the fact that branch clerical functions may differ as between cash and credit customers (Havemeyer Tr. 8477). While some branch clerical activities may not be necessary for cash customers, there are other activities which were required for those customers only (e.g., handling and accounting for the cash collected by the driver) (Havemeyer Tr. 8477). No more precise method was available and the one used by Mr. Havemeyer was appropriate.

700. In another respect Mr. Havemeyer understated the differential by allocating too much of the branch clerical expense to A&P. Since most independent stores were cash

customers - 53 out of 72 studied (RA&PX 180; Havemeyer Tr. 8477) - and since each non-A&P store had to be separately billed whereas A&P stores were all centrally billed (RA&PX 180) involving only a single bill for all A&P stores, it is clear that the allocation of branch clerical cost equally on a delivery basis results in substantially overcharging A&P vis-a-vis all of Borden's other customers.

701. The details of the development of the branch clerical cost are set out on page 48 of RA&PX 170 (Havemeyer Tr. 8466; see also RA&PX 233, p. 11). The total volume in points sold by the O'Hare Branch in the fifth period of 1965 and the points sold by O'Hare in that period in the wholesale, bulk wholesale, vendor, and counter categories are set out on the first line. In the second line, both the O'Hare Branch total office expense and the office expense allocable to each of these categories of business are set forth. Both the volume of delivery and the office expense figures are taken directly from a Borden accounting record, which was received in evidence as RA&PX 70 (Havemeyer Tr. 8466-67).

702. The spreads between the branch clerical costs charged to A&P and the other customers range from a low of about $.0014 in the comparison of A&P's total purchases with

Cardinal Store's purchases (RA&PX 233, p. 44) to a high of about $.0046 in the comparison with Peterson's Foods (RA&PX 233, p. 65). The most common difference is on the magnitude of $.002 or $.003 per point. These differences are far below the 2% discount allowed by the Borden Company to its customers who received central billing (Gose Tr. 1110; Pergler Tr. 5727). The average list price per point for all products sold to A&P in March, 1966 was $.266200 (RA&PX 233, pp. 39-66; RA&PX 1856-2(5); 201B-U). Two percent of $.266200 equals .005324, or more than one-half cent per point, which is greater than even the highest difference determined for the branch clerical function by Mr. Havemeyer, and more than twice that of most of the differences. Contrary to Complaint Counsel's contention, therefore, that there may be extra clerical expense involved in handling A&P's account (C.C. Finding 15(c)(vi)), the record is clear that Mr. Havemeyer's analysis understated the differential.

703. Complaint Counsel suggest that Mr. Havemeyer may have underestimated the portion of clerical expense for school deliveries (C.C. Finding 132). Because of insufficient information in the Borden records, Mr. Havemeyer had to rely on information for March, 1965. RA&PX 74 is a breakdown of Borden's O'Hare routes in March, 1965. It indicates that

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in March, 1965 there were four school routes serving an average of about 20 schools per route. In March, 1966 there were two school routes. The same average number of stops (20) was applied by Mr. Havemeyer to these two routes to determine the number of deliveries to be included in the clerical cost allocation (Tr. 8474-8476). There is no reason to suspect that the average number of stops in a school route would change over the course of a year. Furthermore, this study represents a good-faith effort made by a buyer not a seller, years after the fact. The buyer should not be held responsible for missing information in the seller's records.

704. The branch clerical costs per point for A&P and the other Borden customers are set out in RA&PX 233, pp. 39-66. The spreads indicated between Borden's cost of serving A&P and the allegedly injured customers are the minimum conceivable spreads on the basis of the records now available to the parties, and, indeed, are substantially biased against A&P's cost justification defense. They should be accepted.

5. Product Waste Cost

705. Under the private label program A&P was not entitled

to a return privilege, i.e., a privilege to return out-of-date merchandise that was not defective (CX 62Q). It is clear from the record that Borden saved money in serving a customer who gave up this privilege. Thus it was willing under its published discount schedules, to give a 1% discount to customers who yielded that privilege. E.g., CX 138.

706. RA&PX 165 is a flow chart prepared under Mr. Havemeyer's supervision (Havemeyer Tr. 8224), which illustrates the manner in which he developed the product waste costs (Havemeyer Tr. 8488). Borden's product waste costs were not applicable to the private label program because, as has been noted, A&P did not have, under that arrangement, a return privilege (Havemeyer Tr. 8224). The product waste cost was, therefore, separately determined and charged against the volume of Borden's products eligible for the product return privilege (Havemeyer Tr. 8224).

707. The product waste cost incurred by Borden at O'Hare in March, 1966 is obtained from a Borden ledger, account 723-023-17, which is a part of RA&PX 72. This cost was then divided by the number of points eligible for the return privilege to obtain the product cost per point for stores which were eligible for the return privilege (Havemeyer Tr. 8224-25; RA&PX 165).

708. In order to determine the number of points eligible for the return privilege, Case and Company began with the total regular wholesale points sold by Borden out of the O'Hare branch in March, 1966. This data was obtained from a Borden record, introduced into this proceeding as RA&PX 76 (Havemeyer Tr. 8224). From the total points sold, Mr. Havemeyer subtracted the number of points sold to stores receiving limited services to obtain the volume eligible for the return privilege (Havemeyer Tr. 8224). The product waste cost thus calculated by Case and Company was .001044 per point for the allegedly injured customers (see RA&PX 233, p. 21; Havemeyer Tr. 8225).

709. Each of the allegedly injured customers was assigned the same product waste cost per point (Havemeyer Tr. 8489), whereas A&P was assigned no cost for that function (Havemeyer Tr. 8225; see RA&PX 233, pp. 39-66). The record is clear that A&P did not enjoy a return privilege under the private label program (CX 62Q; Pergler Tr. 5648), whereas all of the other allegedly injured customers on the O'Hare Branch enjoyed this privilege (see RA&PX 35; RA&PX 170, p. 82; RA&PX 233, p. 30).

710. Returned merchandise includes, in addition to out-of-date merchandise, both merchandise returned because of

faulty containers (sometimes referred to as "leakers") and merchandise returned because of spoilage within date (Havemeyer Tr. 7749). Even a customer electing to forego the privilege of returning out-of-date milk was nevertheless entitled to credit for leakers or merchandise spoiled within date (CX 138, fn. 2; CX 62Q). The cost of leakers and milk spoiled within date, as opposed to out-of-date merchandise was not, however, charged by Borden to its product waste account, but was rather charged back to the Borden plant (Havemeyer Tr. 8490, 8783). In any event, leakers or product spoiling within date would only constitute a small portion of the route returns (Havemeyer Tr. 7749).

711. It is true, as Complaint Counsel state (C.C. Finding 15(d)(iii)), that in the profitability study (RA&PX 232) Havemeyer allocated some product waste expense to A&P for leakers and product spoilage within date. However, that figure represented only 5% of the total product waste expense, and as the product waste charged to the allegedly injured customers is miniscule, 5% of that figure would be absolutely de minimus.

712. Throughout this section of their proposed findings, Complaint Counsel have engaged in an apples and oranges analysis. Complaint Counsel argue that since various

retailers have testified that they had very few out-of-date returns, a substantial part of the product waste was therefore due to leakers and product spoilage within date (C.C. Finding 15(d)(ii)). It is obvious, however, that product waste is a relatively small percentage of merchandise delivered, and these retailers merely testified that out-of-date returns were few as an absolute number. Only Minard compared out-of-date returns to leakers and product spoilage within date, and his comparison was extremely rough. In contrast, Havemeyer testified explicitly that leakers and product spoilage within date constituted a very small portion of route returns (Tr. 7749). Similarly, Havemeyer's testimony that Borden probably experienced a high proportion of gallon paper leakers constituted a comparison with half gallon leakers, not with other sources of product waste.

713. Complaint Counsel urge (C.C. Finding 15(d)(iv)) that Mr. Havemeyer should have studied product waste by "different classes of customer, by type of store and volume of purchases." The records available today do not reveal the precise product waste chargeable to any particular customer. Even if it were possible, based upon the available records, to construct some comparison

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of different classes of stores, the immense effort would not be justified, considering the relative unimportance of the product waste figure. Product waste is a quite small figure; it is the second smallest expense and even its total elimination would not alter Mr. Havemeyer's conclusions.

714. The allocation of product waste on an equal per point basis to each customer eligible for the return privilege is a perfectly reasonable hypothesis on which to predicate a cost analysis of the kind presented in this proceeding. The Advisory Committee on cost justification in its report to the Federal Trade Commission recognizes the validity of a per unit assignment of a cost, such as product waste, which cannot be directly assigned:

> "Assignment of these indirect costs is done by measuring the activity or output of the function in terms of units of functional service which can be counted or measured [in this litigation, points], and then applying to each business segment the amount of the functional cost which is in proportion to its use of or responsibility for the units of functional service." (at p. 24)

715. The product waste charged to the non-A&P customers is quite conservative when compared with Borden's published discount schedules. The Borden published discount schedule for the Chicago Metropolitan Region which was effective

during March, 1966 (see CX 138, 139 and 140) provides that "stores participating on the basis of no credit for return merchandise, except for faulty containers or products, will receive an additional 1%" (CX 138, fn. 2). As the average list price per point is on the order of 25¢ (see RA&PX 233, pp. 39-66), this amounts to .0025¢ per point. This figure is more than twice the value charged by Mr. Havemeyer to the customers enjoying the return privilege. Borden's published discount schedule thus demonstrates that the product waste figure charged to the non-A&P customer on O'Hare in Mr. Havemeyer's cost studies was an extremely conservative one.

716. Borden's product waste cost for O'Hare for March, 1966 was taken directly from a Borden accounting record, identified on its face as a delivery expense account (see RA&PX 72, page entitled "Location 723, Account 023, Delivery Exp.-M"). The product waste cost is reflected in a subaccount within the delivery expense accounts. Separate subaccounts are set out in this same Borden accounting record for all other expenses associated with the delivery function, including the wages and commissions of route men. The set-up of the account makes it quite clear that Borden's handling costs for picking up and

returning out-of-date merchandise is not included in the product waste account charge (see RA&PX 72, page entitled "Location 723, Account 023, Delivery Exp.-M"). The cost of the time of the Borden route men who would perform this function is separately reflected on this same Borden account record under wages, commissions and supplementary employment benefits. It is undoubtedly because of Mr. Havemeyer's exclusion of the extra labor costs involved in returning out-of-date merchandise that the product waste cost figure per point which he derived, .001044 per point (RA&PX 233, p. 21), is so much lower than the figure one would obtain for this cost by applying the discount allowed on the Borden published discount schedule, .0025. The allocation of product waste charges thus made by Mr. Havemeyer in his cost analysis can only be an understatement of the actual cost incurred by Borden of providing this service to those of its customers who elected to receive it.

6. Branch Selling Costs

717. One of the expenses incurred at the O'Hare branch was selling expense, i.e., expenses associated with the activities of the salesmen who worked out of the branch. It is evident that, once the private label program was

entered into no selling effort at the branch was necessary with respect to A&P. The record shows that the salesmen did not in fact call on the A&P stores (Pergler Tr. 5744-45; Havemeyer Tr. 8225). Thus, this was a cost no part of which was allocable to A&P.

718. RA&PX 166 is a chart prepared under Mr. Havemeyer's supervision which illustrates the manner in which the branch selling expenses were calculated (Havemeyer Tr. 8225). From Borden accounting records, Mr. Havemeyer determined the costs associated with the branch selling expense at O'Hare in March, 1966 (Havemeyer Tr. 8225). As has been noted, the branch selling function was not applicable to the private label program (Havemeyer Tr. 8225). Accordingly, Mr. Havemeyer determined the number of points delivered to all the other stores on the O'Hare Branch and divided the total branch selling expense by those points, thereby arriving at a branch selling cost per point for those stores (Havemeyer Tr. 8225, RA&PX 166).

719. The details of the calculation of the branch selling expense per point are shown on RA&PX 170, p. 62 (Havemeyer Tr. 8492). The total branch selling expense allocable to non-A&P stores on the O'Hare wholesale routes is obtained from the Borden ledger card for location 723,

account 023, which is a part of RA&PX 72 (Havemeyer Tr. 8492; RA&PX 170, p. 62, RA&PX 233, p. 23). The expense items which make up the total branch selling expense are salesmen salaries, fringe benefits, travel expenses, Borden welfare, and other expenses (Havemeyer Tr. 8492-93).* Location 723, account 023 represents the O'Hare Branch wholesale store delivery expenses (Daube Tr. 9180-81 RA&PX 68 and 72, account 723-23). With the exception of the expense item for fringe benefits, all of the items shown on page 62 of RA&PX 170 (and on p. 23 of RA&PX 233) are direct transfers from the Borden ledger, Location 723, account 023 (Havemeyer Tr. 8375-76, 8492; compare RA&PX 170, p. 62 and RA&PX 233, p. 23 with RA&PX 72, Location 23, account 023, subaccounts 4, "Wages Salesmen"; 8, "Welfare Bordens", 36, "Travel Expense", and 50 "Other Expenses").

720. Subaccount 4, "Wages Salesmen", records and salary of salesmen servicing wholesale business (Daube Tr. 9181). While there was some bulk wholesale business on regular wholesale routes at O'Hare in addition to stores (Havemeyer Tr. 8494), the Borden Company maintained a separate

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* The Borden welfare expenses item was inadvertently omitted from page 62 of RA&PX 170 although the amount of this item, $29.34, was included in the total (Havemeyer Tr. 8493). It is now included in the final revision of the O'Hare cost studies (see RA&PX 233, p. 23).

account, 725-23, in which the salaries of salesmen who solicited those accounts were charged (Daube Tr. 9230; Havemeyer Tr. 8496).

721. In spite of Complaint Counsel's protests (C.C. Br. 146, 147), Subaccount 36, "Travel Expenses", does record the traveling expenses of salesmen serving wholesale store accounts (Daube Tr. 9181), and of that portion of the travel expense of the branch manager that related to sales activities at stores (Daube Tr. 9211, 9215). "The intent of the account . . . is to absorb the traveling expense cost of salesmen and managers engaged in that activity" (Daube Tr. 9215). This account was, therefore, properly allocated by Mr. Havemeyer to the branch selling expenses.

722. Subaccount 8, "Borden Welfare" was a separate selling account for Borden's selling personnel (Havemeyer Tr. 8378). Complaint Counsel protest that this expense should have been included by Mr. Havemeyer as part of the delivery expense because he allocated this item as a part of delivery expense in his profitability study (C.C. Br. 149). This argument is invalid because it assumes that the records with which Mr. Havemeyer was working were similar in both studies. They were not

similar however, as our findings in these two studies make clear. In any event, the amount is so miniscule, $28 out of $4,171 (RA&PX 233, p. 23), as to have no effect on Mr. Havemeyer's determination of the branch selling cost.

723. Subaccount 50, "Other Expenses", was assigned by Mr. Havemeyer to the branch selling expense functions because this account includes miscellaneous expenses which are not otherwise classified (Havemeyer Tr. 8283). In his analysis of the profit that Borden might reasonably anticipate earning on its private label bid to A&P of September 21, 1965, Mr. Havemeyer had also attributed "other expenses" to the selling function (Havemeyer Tr. 8385). At the time selected by Mr. Havemeyer to analyze Borden's potential profit, May 1965 (Havemeyer Tr. 8162), there was available a detailed breakdown of the subaccount 50 account (Havemeyer Tr. 8386). On the basis of his analysis of that detail, Mr. Havemeyer was able to conclude that none of the amount entered in that account was attributable to Borden's cost of doing business with A&P (Havemeyer Tr. 7754). The detail of this subaccount 50 identifies each of the expense items as a petty cash expenditure, or where the detail does not expressly state petty cash, it identifies the item as a sum of money paid to Mr. Pergler (Havemeyer Tr. 7753-54; RA&PX 71, account

723-23). All but $27 out of a total of $2,024 entered in subaccount 50 (Havemeyer Tr. 7754; RA&PX 71, account 723-23) are so identified (Havemeyer Tr. 7754). These petty cash disbursements at the O'Hare Branch were not used for the service of A&P (Pergler Tr. 5651).

724. Although all of the expenditures charged to Mr. Pergler's account in subaccount 50 do not expressly state petty cash, Mr. Havemeyer's opinion was that none of those items were applicable to Borden's A&P business, since they were all in the nature of petty cash disbursements (Havemeyer Tr. 7754). All of the entries appear in the same Borden account. They all reflect expenditures charged to what Borden calls "other expenses". If these miscellaneous expenses had been specifically related to the delivery system as opposed to the selling function they would have been so specified and posted in those accounts which are related to the route system (Havemeyer Tr. 8383, 8385).

725. The detail that was available on subaccount 50 of Location 723, account 23 in May, 1965 was not available in March, 1966 (Havemeyer Tr. 8386), but, in the absence of contrary information, it is reasonable to assume, as Mr. Havemeyer did, that the basic accounting method used in 1965 was continued in 1966 (Havemeyer Tr. 8386). Moreover, this

assumption is bolstered by the comparable amounts charged to this account in May, 1965 and March, 1966 - $2,024 in May, 1965 (RA&PX 71, account 723-23) and $1,539 in March, 1966 (RA&PX 72, account 723-23). Complaint Counsel's objections to Mr. Havemeyer's treatment of these costs (C.C. Br. 147, 148) are, therefore, not well taken.

726. The fringe benefit expenditures are Mr. Havemeyer's calculation of the cost to Borden of these expenditures on behalf of its branch salesmen. It was determined as 19.42% of the salary of the salesmen (Havemeyer Tr. 8378; RA&PX 170, p. 37). The fringe benefit percentage was determined by first calculating a sub-total of all fringe benefit expenditures identified on account 723 and dividing that sub-total by the sub-total of all compensation payments charged to account 723 (Havemeyer Tr. 8376; RA&PX 170, p. 37).

727. The branch selling expense per point was determined by dividing the total branch selling expense of $4,171.51 by the number of points delivered to non-A&P stores on the O'Hare regular wholesale routes, 260,127. The cost of the branch selling expense for non-A&P stores at O'Hare in March, 1966 was $.0160 ($.01036 to six decimals) per point (Havemeyer Tr. 8492-93; RA&PX 170, p. 62, RA&PX 233, p. 23). There was no branch selling cost attributable

to A&P (Havemeyer Tr. 8225). The cost of $.0160 per point was then charged against each of the allegedly injured customers (Havemeyer Tr. 8497-98). This is shown on RA&PX 233, pp. 39-69).

728. Complaint Counsel object that Mr. Havemeyer did not consider the general expense of missionary work in his allocation. They argue that the salesmen's most important function was to obtain new business and that they did not spend all their time with existing, non-A&P, store customers. Thus they contend that this expense is a general expense and should be borne equally by all customers on a volume basis (C.C. Finding 15(e)(i)).

729. Complaint Counsel's argument is unfounded. The record does not support Mr. Lemberg's claim that the focus of selling effort was directed to the acquisition of new business (Lemberg Tr. 9417). No witness made such a statement. Eugene Dischner, Sales Director for Borden's Chicago Metropolitan Division, from November 1, 1967 through December 31, 1968 (Dischner Tr. 7160), and who was in charge of sales (Dischner Tr. 7161), testified that the primary function of the sales staff was to "take care of present business and acquire new business for the Borden Company." (Dischner Tr. 7161). The sales staff made "calls on prospective customers and existing

customers." (Dischner Tr. 7161). Nowhere does Mr. Dischner or anyone else indicate that the majority of the salesmen's time was devoted to calling on prospective customers, as opposed to existing accounts. It should be borne in mind that efforts to acquire new business are not confined to soliciting new accounts. New business is also secured by getting more business from existing accounts, e.g., a customer who carries one or more brands of milk products in addition to the Borden label may be induced to meet a greater proportion of his milk requirements with Borden milk and dairy products, and a customer may be assisted in increasing his sales of Borden's milk and dairy products.

730. It is entirely appropriate accounting procedure to charge all indirect expenses incurred in conducting an activity "in terms of units of functional services which can be counted or measured." Advisory Committee On Cost Justification, Report To The Federal Trade Commission, February, 1956, page 24. The Committee gives an example, which is particularly relevant to the calculation of the branch selling function in this case.

> "A simple example makes this process clear. If the function is personal selling, one possible unit of functional service in a customer analysis may be sales calls. If customers are divided into classes A, B, and

> C, and if 10 percent of the calls are made on Class A, 30 percent on Class B, and 60 percent on Class C customers, then the three classes share the cost of personal selling in those proportions.
>
> "Procedure for other functions is similar. The steps are as follows:
>
> 1. Ascertain the total cost of the function.
>
> 2. Decide on an appropriate service unit by which the performance output of the function may be measured.
>
> 3. Measure the number of service units required by each segment to be costed -- in the example above, by the three classes of customers.
>
> 4. Apply the costs of the function to the segments in proportion to the service units required." (at 24).

731. The branch selling activity was calculated in precisely this manner by Mr. Havemeyer. Points were the units of functional service which he counted. Mr. Havemeyer, following the recommendation of the Advisory Committee, then "applied to each business segment the amount of the functional cost which [was] in proportion to its use of or responsibility for the [sales activity]". Id. There were three classes of customers served on the O'Hare routes. Class A customers consisted of all the A&P stores, on whom no branch selling function was expended under the

terms of the private label contract (Havemeyer Tr. 8225; CX 62Q). Class B customers consisted of all the bulk and institutional customers on the routes. The sales expenses connected with servicing this class of customers was entered by Borden in a separate account, 725-23 (Daube Tr. 9230). This leaves the non-A&P store customers on the O'Hare Routes as class C. To these customers was assigned the sales cost of soliciting such customers, which was separately set out by Borden in its accounting system as expenditures incurred in connection with its branch sales function for those customers (see A&P Findings 719-726 above).*

732. Complaint Counsel's second objection is to the assignment of the entire branch selling expenses to the non-A&P store customers on the regular wholesale routes (Havemeyer Tr. 8494; RA&PX 166) rather than assigning some of it to bulk customers (C.C. Finding 15(e)(ii)).

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* Indeed, although Mr. Lemberg advanced the claim on direct examination, set out in A&P Finding 728 above, that it is inappropriate to charge a class of customers with sales costs expended in soliciting other accounts, he did not expressly state that he believed it was improper to assign such costs to all members of the same class as the new accounts contacted. In fact, he stated on cross-examination that he believes it is proper to allocate the cost of a salesman's work according to the time spent on different classes of customers (Lemberg Tr. 9433). It must be acknowledged, however, that the context of Mr. Lemberg's answer makes his meaning somewhat obscure.

733. This objection is also without merit. As stated above the branch selling expenses incurred in serving these customers were entered in Borden's accounting records in a separate bulk account (Havemeyer Tr. 8496; Daube Tr. 9230; A&P Findings 720-26). Although some bulk accounts did appear on the regular wholesale routes analyzed by Mr. Havemeyer, it is very unlikely that these accounts would have been served by the store route salesmen since bulk accounts require a person with specific knowledge of the bulk business (Havemeyer Tr. 8496). Consequently the allocation of the entire branch selling expenses to be found in Location 723, account 23, to the non-A&P store customers was proper, and did no more than follow the Borden accounting system.

734. Moreover, while Mr. Lemberg does not expressly state that Mr. Havemeyer was correct in not assigning any portion of the branch selling expenses from Location 723, account 23, to the bulk customers on the O'Hare routes, he did not advance such non-assignment as one of the reasons for his disagreement with Mr. Havemeyer's allocation (see Lemberg Tr. 9416-20). On the contrary, he seems to indicate that, with the exception of the effort to secure new accounts, it was appropriate to

charge the entire amount of the selling expenses reflected in Location 723, account 23, to the Borden wholesale customers (Lemberg Tr. 9419).

735. Complaint Counsel also protest that the record does not support the position that salesmen did not call on A&P stores. They point out that the terms of the private label agreement provide that "Borden salesmen's services will be supplied at the store level only, to follow through on a complaint covering such matters as service, product or container (CX 62Q)" (C.C. Br. 144). Complaint Counsel see fit to emphasize the phrase, "will be supplied at the store level" but attempt to ignore the word "only". Following through on complaints is a minor sales activity. Complaint Counsel are, therefore, unjustified in criticizing Mr. Havemeyer's exclusion of the sales function as an activity to be charged against A&P. Their position that he should have made a study of the time spent by Borden on this function at A&P years ago is ludicrous.

736. Complaint Counsel object on the ground that the selling expense was allocated on the "erroneous basis" that the salesmen spent all their time with existing non-A&P store customers (C.C. Finding 15(e)(iv)).

This is merely a renewal of their earlier argument that Mr. Havemeyer failed to take into account the general expense of missionary work (C.C. Finding 15(e)(i)), and has already been disposed of (A&P Findings 729-731).

737. One additional point needs to be considered in connection with the allocation of the branch selling function made by Mr. Havemeyer. The Commission Accountant, William Lemberg, agrees that at least some of the selling effort was directed to the allegedly injured customers, and that they should be charged with the cost of that effort (Lemberg Tr. 9488). Mr. Lemberg further acknowledged that there is no information available as to what proportion of the selling expense was attributable to the solicitation of new accounts as opposed to the servicing of existing accounts (Lemberg Tr. 9487-88), and that it would have been inaccurate to fail to assign at least part of the branch selling expense to the allegedly injured customers (Lemberg Tr. 9488). Further, Mr. Lemberg offered no objection to Mr. Havemeyer's determination that no part of the branch selling expense should be allocated to A&P (see Lemberg Tr. 9416-20).

738. Although Complaint Counsel do not expressly so state, the real gravamen of their criticism of Mr. Havemeyer's allocation of the branch selling expense seems to be that, while it is appropriate to allocate selling expenses among classes of customers (Lemberg Tr. 9433), the allocation made by Mr. Havemeyer was inadequate because it made such an allocation of the branch selling expense to the allegedly injured customers without making some allocation of Borden's central office selling expenses to A&P. In this regard, Complaint Counsel urge that Mr. Havemeyer has not studied the sales expense of Mr. Tarr and his assistants who allegedly spent considerable time on the A&P business (C.C. Finding 15(e)(v)). This argument was foreshadowed by the testimony of Mr. Lemberg in which he expressed the view that such time should have been charged directly to the A&P business (Lemberg Tr. 9420). He refused to accept Mr. Havemeyer's allocation of the overhead of the central office to A&P and all the other customers as adequate to compensate for Borden's selling efforts to A&P (Lemberg Tr. 9496-9498). While acknowledging that a portion of the salaries of these men was probably allocated to A&P in the allocation of overhead expenses made by Mr. Havemeyer (Lemberg Tr. 9498), and while indeed agreeing that the allocation of central office expenses on the basis of a percentage of costs previously

allocated, as was done by Mr. Havemeyer, is an almost universally accepted accounting practice (Lemberg Tr. 9550), he nevertheless persisted in asserting that where sales managers or others handle specific accounts, the costs of their time should be charged directly to those accounts (Lemberg Tr. 9500). He insisted on this view in spite of his acknowledgement that it would not be fair to directly charge A&P with the cost of the time of men such as Mr. Tarr without at the same time charging the balance of the central office costs to the other customers (Lemberg Tr. 9499). Mr. Lemberg was also frank in acknowledging that he was "not suggesting that could have been done" (Lemberg Tr. 9499), and that to make such an allocation on a fair basis it would have been "preferable" (Lemberg Tr. 9500) to have conducted a time study to determine how they spent their time (Lemberg Tr. 9500). He further stated that such a time study "would not be practical in a case like this" (Lemberg Tr. 9500).

739. It is evident that the more precise allocation urged by Mr. Lemberg was not possible. There is nothing in the record that will tell us how much time the O'Hare Branch salesmen spent on each of their customers, existing or prospective (Lemberg Tr. 9487-88; Havemeyer Tr. 9699). Nor, without the benefit of a time

study, can such an allocation be made of the time of the central office personnel (Lemberg Tr. 9499-9500). The testimony in the case did not give enough information about the activities of Tarr, Gose, Malone, and other central office personnel to permit an allocation of the costs associated with them on the basis of the way in which they spent their time. There is also no information in the record as to the activities of other central office personnel who might have devoted all their time to store customers other than A&P.

740. It must also be recognized that while the Borden accounting system was maintained in such a way as to permit a separate identification to be made of the branch portion of total selling expenses, the records do not permit the identification of selling expenses incurred at the Central Office. A portion of the branch selling expense was clearly chargeable to the allegedly injured customers. As Mr. Lemberg admitted, an allocation which did not allocate that expense to those customers would have been inaccurate (Lemberg Tr. 9488).

741. Since neither records or other evidence existed which would permit a more precise allocation of central office selling expense, the only way in which to make

an allocation of such central office selling expenses is by the overall allocation of all central office expenses in proportion to the allocation of other costs, the method used by Mr. Havemeyer and the method virtually universally used for the allocation of such expenses (Lemberg Tr. 9500).

742. Some idea as to the impact of a more precise allocation of Central Office selling expense, if it were possible, may be obtained from a consideration of the outer limits of any allocation of such expense to A&P. The sales overhead portion of central office expense is $25,752.35 (RA&PX 233, p. 6; RA&PX 170, p. 6). If this entire amount were charged against A&P - and that, of course, would be clearly inappropriate - the $25,752.35 would be divided by the 3,356,772 points sold to A&P in the Chicago Metropolitan Region (CX 42D). This would result in a charge against A&P of $.0076 per point.

743. As Mr. Lemberg acknowledged, however, it would not be fair to allocate this cost to A&P (even assuming the record supported such an allocation), without at the same time charging the allegedly injured customers with central office costs incurred in their behalf. It is clear from the record that there are such costs.

private label. In RA&PX 232, Mr. Havemeyer was charging A&P with a small portion of Borden's general sales overhead expenses (A&P Findings 592). This is entirely consistent with his allocation of such expenditures in this study because, here too, Mr. Havemeyer has allocated part of Borden's general sales overhead to A&P in his overall allocation of Central Office expense (A&P Finding 741).

747. In summary, the allocation of branch selling costs made by Mr. Havemeyer in his analysis is proper and in accord with generally accepted accounting principles and should be accepted.

7. Borden Label Advertising Expense

748. Since the milk sold to A&P under the private label program did not bear the Borden label, it did not receive the benefit of Borden's advertising program. Thus, it was appropriate to allocate advertising expense to Borden label products, but not to private label products.

749. RA&PX 167 is a flow chart, prepared under Mr. Havemeyer's supervision, which illustrates the manner in which Mr. Havemeyer developed the Borden label advertising expenses (Havemeyer Tr. 8226). From the

Borden accounting records, RA&PX 73, Case and Company secured the average annual advertising expenditure per point for the entire Chicago Metropolitan Area (Havemeyer Tr. 8226, 8515; RA&PX 167). This figure was multiplied by the total points sold in the Chicago Metropolitan Area - including retail (Havemeyer Tr. 8515) - to arrive at the total advertising expenditures, per Borden records, for the Chicago Metropolitan Area (Havemeyer Tr. 8227; RA&PX 167). This figure was then divided by the total points affected by Borden advertising to determine an advertising cost per Borden label point (Havemeyer Tr. 8227; RA&PX 167).

750. The total points affected by Borden advertising was determined by subtracting the total points unaffected by Borden advertising from the total points sold in the Chicago Metropolitan Area (Havemeyer Tr. 8227; RA&PX 167). The total points sold by Borden in the Chicago Metropolitan Area is taken directly from a Borden accounting record introduced into these proceedings as RA&PX 75 (Havemeyer Tr. 8515). The total points not affected by Borden advertising was determined by the simple process of adding the points sold through those outlets which are unaffected by advertising, in

the instant study, non-stores on the regular wholesale routes, bulk wholesale sales, counter sales and private label sales (Havemeyer Tr. 8226-27; RA&PX 167).

751. Complaint Counsel contend that a portion of the Borden advertising expense should be allocated to non-store sales (C.C. Finding 15(f)(i)). They advance no reasons for this contention other than that Borden's accounting records allocated such costs to all points for certain internal purposes. The Borden record relied on does not show that such an allocation is appropriate in a cost study designed to determine the comparative costs of dealing with different customers. Since non-store sales are not affected by Borden advertising, these sales should not be charged with this expense. As noted by Mr. Havemeyer, bulk sales of milk are determined largely on the basis of price, assuming that adequate service is provided. A restaurant patron will usually not know the brand of milk he is being served, is not able to choose among brands at the restaurant even if he knew the brand being served (since only one brand is offered), and will not choose a restaurant on the basis of the brand of milk served. A plant worker will not go outside the plant in order to purchase a brand of milk other than that offered at the plant. By contrast, the supermarket shopper is offered

a choice of brands in many stores, and can also go to a neighboring store to purchase a different brand of dairy product (Havemeyer Tr. 8864-65).

752. The actual calculation of the Borden label advertising expenses is found in Attachment 7 of RA&PX 233, p. 25). The average cost per point of Borden label advertising was determined by Mr. Havemeyer to be $.00067. This cost is assigned to each of the allegedly injured customers (Havemeyer Tr. 8514; RA&PX 233, pp. 39-66). In the comparison involving A&P's purchases of private label items only, no advertising expenditure is charged against A&P since Borden label advertising is, of course, not directed toward the promotion of the sale of A&P label products (Havemeyer Tr. 8511-12; RA&PX 233, pp. 39-66). A&P is charged with .000400 in the comparison of A&P's total purchases with those of the allegedly injured customers (Havemeyer Tr. 8514; RA&PX 233, pp. 39-66). This figure was arrived at by multiplying the average Borden label advertising expense of approximately .0007 per point by the ratio of Borden label points to total points going to A&P (Havemeyer Tr. 8514).

753. Complaint Counsel also argue that A&P private label purchases should be charged with a portion of Borden's advertising expenses because Borden advertising would increase sales, thereby permitting economies of scale and lowering costs per unit, and thus decreasing A&P's costs under the private label contract (C.C. Finding 15(f)(ii)).* This is entirely inappropriate since the purpose of a Robinson-Patman cost analysis is to distribute existing costs, not take account of marginal cost effects such as the one described. In any event, any such effect is highly speculative and impossible to quantify in any meaningful way. In addition, any advertising expense assigned to A&P's private label purchases would obviously have to be less than the amount assigned to the Borden label purchases of A&P and the allegedly injured customers. Since the Borden label advertising expense is by far the smallest component of Mr. Havemeyer's study (.000666 per unit for the allegedly injured customers (RA&PX 233, pp. 24-25, 39-66)), a fraction of that amount would be altogether _de_ _minimus_.

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* Complaint Counsel also wrongly characterize the private-label contract as a "cost-plus" contract. There was nothing in the contract which automatically adjusted A&P's prices to Borden's costs, other than those Borden incurred in connection with the purchase of raw milk. Economies of scale would obviously be of no help to Borden or A&P where the only cost plus feature is one that is fixed on a per unit basis. The raw milk cost was such a cost, e.g., $4.32 per hundred pounds (CX 62).

754. Complaint Counsel claim that Mr. Havemeyer has overestimated the private label sales on a regional basis thereby underestimating the Borden label sales and increasing the advertising cost per point on the Borden label products (C.C. Finding 15(f)(iii)). Again the matter is de minimis. Mr. Havemeyer used the best records available to make this allocation. The advertising cost charged against the Borden label products is only $.000666 per point (RA&PX 233, pp. 39-66). If Mr. Havemeyer had overstated this cost by as much as 100%, the decrease in the cost justification he has demonstrated would be only $.000333, or three hundreths of a cent. Moreover, we are interested to note that Complaint Counsel acknowledge that "the use of O'Hare as representative of the rest of the Region" is not always appropriate. If this is true, what evidence have they offered to show that "the use of O'Hare as representative of the rest of the Region" is appropriate in their price comparison, CX 183A-D?

755. Finally, in the Borden accounting system - and in this, Borden's system was typical of dairy accounting systems - there is considerable averaging (Havemeyer Tr. 8520). Thus, Borden's advertising expenditures were expressed as an average of all points of all kinds

sold, id. It is, for this reason, that the figure of .0004, which Mr. Havemeyer took from RA&PX 73 was increased somewhat because some of the points from which the average of .0004 was determined were, in fact, not affected by Borden advertising, id. It was, therefore, necessary to make some reasonable determination of what this correct value should be. In this regard, it should be noted that Mr. Havemeyer used yearly figures because a particular month figure might not be representative (Havemeyer Tr. 8513). If, in fact, Mr. Havemeyer had contented himself with taking the per point advertising expense from the Borden Regional records for March, 1966, he would have obtained a figure of .0009 per point (see RA&PX 73, page identified March, 1967, line 6, column headed "Last Year"), which is 50% higher than the one Mr. Havemeyer determined. Likewise, the figure calculated by Mr. Malone in the exhibit introduced by Complaint Counsel, CX 54B, gives a higher result for advertising, namely, .0011, than that calculated by Mr. Havemeyer. In any event, the difference between the figure used by Mr. Havemeyer and any other possible figures is so miniscule that any further discussion would be an exercise in "counting angels on the head of a pin."

8. Borden Label Merchandising Expense

756. Since under the private label program A&P was entitled to no merchandising services, and received none, it was appropriate to allocate merchandising expense to customers other than A&P, who received such services, but not to A&P.*

757. RA&PX 168 is a flow chart which explains the methodology employed in determining the merchandising expense per point (Havemeyer Tr. 8228). As in the case of advertising, one must first determine the number of regular wholesale points requiring merchandising support in the Chicago metropolitan area. The merchandising expense for the Chicago metropolitan area is then divided by those points to determine the merchandising expense per point (Havemeyer Tr. 8228; RA&PX 168).

758. Because the records which would have allowed a simple calculation of the merchandising expense per point were not available, it was necessary to utilize a relatively more complicated procedure to determine the cost of this function (Havemeyer Tr. 8230).

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* It should be recalled that, under the terms of the private label agreement of September 21, 1965 between Borden and A&P, Borden was not to furnish any merchandising support to A&P (CX 62Q).

759. The calculation of the merchandising expense per point is shown in attachment 8 of RA&PX 170, p. 71 (Havemeyer Tr. 8528), and will also be found on page 27 of RA&PX 233.

760. The total amount expended by Borden in merchandising throughout the Chicago metropolitan area is taken directly from the Borden accounting records, ledger account 730-032, which is a part of RA&PX 72 (Havemeyer Tr. 8524-25; RA&PX 168; RA&PX 233, p. 27).

761. Since the merchandising expense applies to the entire metropolitan Chicago area, it is, of course, necessary to determine the number of points in that area requiring merchandising support (Havemeyer Tr. 8229). Because the records to make this determination directly were not available, it was necessary to determine this figure in an indirect manner (Havemeyer Tr. 8230). Mr. Havemeyer, therefore, obtained the total O'Hare Branch Regular wholesale points from RA&PX 76 (Havemeyer Tr. 8525; RA&PX 170, p. 71). From those points he subtracted the number of wholesale points which did not require merchandising support (Havemeyer Tr. 8229). These points were the points delivered to schools and other non-store customers, and the total points, Borden and private label, delivered to A&P (Havemeyer Tr. 8225-26; RA&PX 170; p. 71).

762. Complaint Counsel complain that there is no evidence to show that the Chicago Central Office merchandising expense should not be applied to bulk wholesale, vendor and retail business. (C.C. Findings 15g(i)-(ii).) They offer no evidence to support their argument, which flies in the face of the logical conclusion that there is no merchandising expense associated with customers of this kind. As an expert in such matters Mr. Havemeyer was entitled to draw this obvious conclusion.

763. Only 14% of the regular wholesale points at O'Hare were left after the subtraction described in A&P Finding 762. These were the points requiring merchandising support (Havemeyer Tr. 8526; RA&PX 170, p. 71). Having determined that 14% of the regular wholesale points at O'Hare required merchandising support, Mr. Havemeyer then applied this percentage to the total wholesale points sold on regular wholesale routes in the Chicago metropolitan area (RA&PX 233, p. 27).

764. The total wholesale points sold on regular wholesale routes throughout the Chicago Metropolitan Region were obtained by subtracting the bulk wholesale points (taken from RA&PX 76) from the total wholesale points in the Chicago metropolitan area (taken from RA&PX 75, line 67

and RA&PX 76). Thus, the points sold on the bulk wholesale routes operating in the Chicago Metropolitan Region in March, 1966, O'Hare and Holland Road, totalling 1,528,053 (RA&PX 170, p. 71; RA&PX 233, p. 27; RA&PX 76, p. "third month ending 3/31/66") are subtracted from 4,809,929 points, the total points sold in that same month throughout the entire Chicago metropolitan area (RA&PX 75, page entitled "Chicago, Month March, 1967", line 67, col. "Month, Last Year") to obtain the points sold on regular wholesale routes (Havemeyer Tr. 8527; RA&PX 233, p. 27; RA&PX 170, p. 71). In this manner, Mr. Havemeyer obtained the regular wholesale points in the Chicago metropolitan area requiring merchandising support (Havemeyer Tr. 8526-27; RA&PX 170, p. 71).

765. The total merchandising expense figures for Chicago were then divided by these points requiring merchandising expense to obtain the merchandising expense per point of $.0086 (Havemeyer Tr. 8527-28; RA&PX 170, p. 71). The merchandising expense of $.0086 was applied to each of the allegedly injured customers (Havemeyer Tr. 8536). No cost for this function is assigned to A&P since none of the merchandising expenses were incurred by Borden in serving A&P under the agreement of September 21, 1965 (CX 62Q).

766. Mr. Havemeyer's treatment of the data on RA&PX 75 is predicated on the assumption that the data on that exhibit

includes the entire Chicago metropolitan region, but does not include the Calumet or Hammond region of Indiana (Havemeyer Tr. 8528-29).

767. Complaint Counsel urge that Mr. Havemeyer has erroneously interpreted Borden records in reaching his conclusion that a Chicago Main Office Account would not apply to the Hammond Branch and to the various "trailer runs" in Indiana. (C.C. Finding 15(g)(iii)). Complaint Counsel argues that RA&PX 68 is a partial listing of "location numbers" for May 1965. According to them, changes in Borden Account records between May 1965 and March 1966 are embodies in RA&PX 72. They contend that Locations 781-785 on RA&PX 72 show expenses for Hammond, Hammond distributors, Hebron, South Bend and Warsaw. They further urge that "location numbers" for various trailer runs could not be identified and were consequently not included in RA&PX 68. (C.C. Finding 15(g)(iii)).

768. Complaint Counsel's argument is in error, and without foundation in the record. At the outset, we note that although Complaint Counsel had the opportunity to present their own expert testimony on the question, they did not do so. Idle speculation cannot be allowed to replace

the testimony of an expert in cost accounting who has studied and reviewed in detail the records of the Borden Company, and reconstructed, on the basis of that study, the appropriate amount of money expended by Borden in merchandising support. A careful examination of the records supports Mr. Havemeyer's conclusion.

769. In the first place, as Mr. Havemeyer pointed out, RA&PX 67, which is a listing of the Borden expense accounts and is entitled "Chicago Metro" (Havemeyer Tr. 8355; RA&PX 67, p. 1), contains no entries for Hammond expenditures (Havemeyer Tr. 8531-32). Consequently, Hammond did not come within the Chicago metropolitan area in March, 1966 (Havemeyer Tr. 8535).*

770. We would note, moreover, that there is in existence a Borden accounting record for the fifth period of 1965, which allocates O'Hare Branch merchandising expense (RA&PX 70). Borden, following the same procedure employed by Mr. Havemeyer in his studies, assigned the entire O'Hare merchandising figure to the wholesale accounts, and expressly indicated that none was assigned to bulk wholesale, vendor or counter sales (see RA&PX 70).

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* Complaint Counsel disputed this statement by Mr. Havemeyer, and pointed to account 801-181-101, which appears in RA&PX 67 (Havemeyer Tr. 8533). As Mr. Havemeyer pointed out, however, that account is not an expense account, but rather an asset account (Havemeyer Tr. 8533).

Furthermore, the great bulk of the sales identified as being sold in the Hammond area are identified as wholesale trailer (or vendor) sales, and hence, according to Borden's own accounting records would not be charged with merchandising expense (see RA&PX 70, page entitled "3rd Month Ending 3/31/66"). Moreover, RA&PX 70 states that there were only 608,486 total points sold in March, 1966 at the Hammond Branch, exclusive of the vendor sales, id. This compares with the 4,809,929 points* sold in Chicago (RA&PX 75, page dated March 1967, line 67, col. "Last Year") and which Mr. Havemeyer used as the figure for the entire Chicago metropolitan area (Havemeyer Tr. 8524-25). Non-vendor sales at Hammond are, therefore, only 12.4% of Chicago wholesale sales. Even if they had been included by Mr. Havemeyer, therefore, in calculating the per point merchandising expense, their omission would have no significant effect on Mr. Havemeyer's calculation.

771. Complaint Counsel protest that no study was made of the class of customers in connection with merchandising support, and that consequently no account was taken of the possibility that merchandising expenditures might vary between different types of customers. (C.C. Finding 15(g)(iv)).

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* The figure of 4,809,929 points can be obtained by adding all sales figures for the branches listed under "Chicago" on RA&PX 76 for March, 1966. Thus, it is clear that the sales figures for Chicago on RA&PX 75 do not include Hammond sales.

Of course, they do not suggest how Mr. Havemeyer might have undertaken such an investigation so many years after the fact. In any event, there is no basis for their idle speculation that merchandising expense was not expended on a basis roughly proportional to the volume of sales to the customers.

9. General Selling and Administrative Expense

772. RA&PX 169 is a flow chart, prepared by Mr. Havemeyer, which illustrates the procedure he followed in developing the general selling and administrative expenses, also referred to as overhead costs, incurred by Borden in serving A&P and the allegedly injured customers (Havemeyer Tr. 8230-31). The details of the calculation of this cost are set out in attachment 1 of RA&PX 170 - see especially pages 5-7 (Havemeyer Tr. 8527-38). A revision of this calculation will be found in RA&PX 233, pp. 5-7.

773. In developing the central office overhead expenses, Mr. Havemeyer first obtained the Borden overhead expenses which were to be distributed to marketing cost. He obtained these expenses directly from Borden accounting ledgers for March, 1966 for administrative, division GOS, stationery and forms, general office, sales overhead and credit department expenses (Havemeyer Tr. 8230; RA&PX 169; RA&PX 170, p.6;

RA&PX 233, p. 6). The total of these expenses came to $81,922.86 (RA&PX 170, p. 6; RA&PX 233, p. 6). Since only 3.56% of the total volume sold by Borden's central division was sold to stores on Borden's O'Hare Branch (RA&PX 170, p. 7; RA&PX 233, p. 7), the total overhead expenses were multiplied by this ratio of 3.56% to determine the amount of overhead to be distributed to or charged against O'Hare Branch store customers (Havemeyer Tr. 8232; RA&PX 169; RA&PX 170, p. 6; RA&PX 233, p. 6). 3.56% of $81,922.86 is $2,916.54, which is, therefore, the amount of overhead to be distributed to the O'Hare Branch store customers (RA&PX 170, pp. 5, 6; RA&PX 233, pp. 5, 6).

774. Mr. Havemeyer then determined the total expenses incurred by Borden to serve store customers (Havemeyer Tr. 8231-32, 8537-49; RA&PX 169; RA&PX 170, p. 5; RA&PX 233, p. 5) and divided the $2,916.45 in overhead expenses by the total expenses, thereby determining the ratio between overhead expenses and the total marketing expenses incurred by Borden in serving O'Hare Branch store customers, _id_. This ratio was then used to multiply the total marketing cost elements previously determined for A&P and each of the allegedly injured customers to arrive at the share of general selling and adminstrative expenses to be allocated to each of these customers (Havemeyer Tr. 8537, 8550; RA&PX 159, 169, and 233, pp. 39-66).

775. Complaint Counsel argue that the allocation of overhead expenses should have been made on the basis of total costs rather than merely the marketing costs used by Mr. Havemeyer (C.C. Finding 15(h)(i)). However, Complaint Counsel merely state flatly and without any support that it is "obvious" that a considerable part of the Borden Central Office operation is devoted to production rather than marketing.* However, an inspection of the accounts involved indicates that the costs charged to these accounts were predominently selling and distribution costs rather than marketing costs. Of the six accounts involved, two (Sales Overhead and Credit Department) are exclusively associated with selling, and these accounts represent more than 1/3 of the total overhead being distributed to marketing cost (RA&PX 233, p. 6). At least a considerable proportion of each of the other four accounts is also associated with the selling function.

776. But even if some part of the $81,922.76 were allocated on a point basis (which would neither increase nor reduce any cost differential), the ultimate impact on Mr. Havemeyer's conclusions would be miniscule. For example, the application of the overhead factor of 5.276% to the comparison

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* This portion of Complaint Counsel's findings reflects a misunderstanding of Mr. Havemeyer's allocation of the overhead expenses, for they state that "the O'Hare Branch expenses in March, 1966 were calculated as being about $82,000," and cite to RA&PX 233, p. 6. The $82,000 and the exhibit on which it is found does not, of course, reflect O'Hare Branch expenses at all. $82,000 is the central office overhead expense (A&P Finding 773).

of A&P private label with Robert Battali increases the differential between the costs between them by .003554. If by some reallocation of costs this percentage of 5.276% was cut in half, the change in the comparative costs would be only $.001777.

777. Moreover, the procedure employed by Mr. Havemeyer is in accord with an example given by Wixon in the text cited by Complaint Counsel. See Wixon, Accountant's Handbook, Figure 11, p. 9.26 (4th Ed. 1956).

778. Complaint Counsel also object (C.C. Finding 15(h)(ii)) that Mr. Havemeyer should not have allocated the general selling and administrative expenses on the basis of a percentage of the other expenses (Havemeyer Tr. 8232, 8550). However, these objections are totally without merit. The Commission's own accountant, William Lemberg, agreed that Mr. Havemeyer's allocation of overhead expenses is a generally accepted accounting procedure. Indeed, he acknowledged that it is an almost universally followed practice (Lemberg Tr. 9500). Mr. Havemeyer could not possibly be said to have erred in following so widely accepted an accounting practice.

779. It should also be noted that the federal regulations, cited without explanation in the footnotes to pp. 159-

160 of Complaint Counsel's proposed findings (and codified in 4 C.F.R. Part 403), apply only to defense contractors.

780. One further matter in connection with the allocation of overhead expenses requires discussion. Only a portion of the total overhead expense was distributed to O'Hare store customers, namely, 3.56%,which represented the share of total volume sold by Borden's central division to O'Hare store customers (A&P Finding 773). Naturally enough, therefore, only that portion of total O'Hare Branch expenses for each of the marketing functions attributable to O'Hare stores can be included in determining the total marketing expenses incurred to serve those store customers (Havemeyer Tr. 8231-32; RA&PX 169; RA&PX 170, p. 5; RA&PX 233, p. 5). The details of the determination of the amount of each marketing function to be charged against O'Hare Branch store customers are presented on the first page of attachments 2 through and including 8 in RA&PX 170. The results are gathered together and summarized on the first page of attachment 1 of RA&PX 170 (Havemeyer Tr. 8537-49. The summaries of the expenses incurred to serve store customers and the calculation of the ratio that general selling and administrative expenses bears to all other marketing expenses are set out on RA&PX 170, p. 5 and RA&PX 233, p. 5.

781. In this regard, the Administrative Law Judge, by his ruling of September 16, 1974, has held that the amount of physical delivery cost to be allocated is inadmissible since it was derived, in part, from the relative amount of time spent in serving store and non-store customers (Havemeyer Tr. 8541; RA&PX 170, p. 33; RA&PX 233, p. 14). These times were, in turn, determined by the use of the Case and Company time standards (see RA&PX 180).

782. The amount of the physical delivery cost to be allocated to O'Hare store customers can, however, be redetermined by the use of the serving time figures set out in these findings. In the original study, $4,991.00, which was the route day costs to operate two routes which served only school customers, was subtracted from the total delivery cost of $55,333.05. The remaining expense, $50,342.05, was then multiplied by the ratio between non-store serving minutes and total serving minutes to obtain the amount charged to non-store customers on the regular wholesale routes. This amount was added to the $4,991 and the total subtracted from $55,33.05 to determine the amount of O'Hare Branch physical delivery expenses attributable to O'Hare store customers (Havemeyer Tr. 8540-42; RA&PX 170, p. 33; RA&PX 233, p. 14).

783. Exactly the same procedure and ledger figures can still be used, except the cost of serving non-store customers on the regular wholesale routes is now determined by deducting the sum of the specific costs of serving the non-store customers and the constant costs of serving these customers. The specific cost of serving the non-store customers is obtained by multiplying the 41,564 total serving minutes for non-store customers (physical delivery cost Finding 657) by the $.22604 cost per minute (A&P Finding 659), which yields $9,395.13 (41,564 x $.22604). The common cost of serving the non-store customers is obtained by multiplying the common cost per delivery, $1.938804 (A&P Finding 664), by the total of 1,367 deliveries to non-store customers (RA&PX 180, line 3, col. 16; RA&PX 233, p. 8, line 3, col. 16) which yields $2,650.35. The total cost of serving the non-store customers on the O'Hare regular wholesale routes is thus $12,045.48 ($9,395.13 + $2,650.35). To this is added $4,991.00 originally determined to be attributable to the two O'Hare school routes (A&P Finding 782) to obtain a total of $17,036.48 applicable to all non-store customers on the O'Hare routes ($12,045.48 + $4,991.00). This figure is now subtracted from the original $55,333.05 to obtain a new figure of $38,296.57.

as the O'Hare Branch physical distribution expense applicable to store customers ($55,33.05 - $17,036.48).

784. When this new figure of $38,296.57 is transferred to the summary of expenses incurred to serve store customers (RA&PX 170, p. 5; RA&PX 233, p. 5), the summary and calculation of overhead as a percentage of other marketing expenses will now read as follows:

Amount of Overhead to be Distributed (RA&PX 233, p. 6)	$ 2,916.45 (A)
EXPENSES INCURRED TO SERVE STORE CUSTOMERS:	
Truck Loading (RA&PX 233, p. 9)	6,750.97
Physical Delivery (A&P Finding 783)	38,296.57
Branch Clerical (RA&PX 233, p. 19)	3,396.92
Product Waste (RA&PX 233, p. 20)	566.67
Branch Selling Expense (RA&PX 233, p. 22)	4,171.50
Borden Label Advertising Expense (RA&PX 233, p. 24)	550.57
Borden Label Merchandising Expense (RA&PX 233, p. 26)	2,244.90
Total	$55,978.10 (B)

% General Selling and Administrative Expense of all other Marketing Expense $\frac{(A)}{(B)}$ = 5.210%

10. Overall Conclusion

785. Set out below are the final cost studies, comparing the difference in Borden's costs of serving A&P and each of the allegedly injured customers. Two comparisons are presented. One comparison is between Borden's costs of delivering private label items only to A&P and its cost of delivering all products to the other customers. The second is a comparison between Borden's costs of delivering all products to A&P and all products to the allegedly injured customers. Borden's costs for providing delivery and marketing services for the allegedly injured customers are, naturally, the same in both comparisons. In all cases, the difference between Borden's cost of serving A&P and each of the 28 allegedly injured customers is compared with the difference between Borden's price to A&P and its price to each of those customers. The marketing costs appearing below are, in all cases, identical to those appearing in RA&PX 233, pp. 39-66, except that the physical delivery and general selling and administrative functions have been redetermined in accordance with the method described in these findings. The "marketing costs per point in excess of cost to serve A&P", "net difference in price less net difference in marketing costs" and "net discrimination in favor of" have also been recomputed, of course, to account for the revised physical delivery and overhead figures.

OVERVIEW OF DISCRIMINATION/JUSTIFICATION ANALYSIS, A&P VS. ALLEGEDLY DISCRIMINATED CUSTOMERS, O'HARE BRANCH, MARCH 1966. (1)

	BASED ON A&P PURCHASES OF P.L. ITEMS ONLY		BASED ON A&P PURCHASES OF TOTAL PVT. L. AND BORD. LABEL	
MARKETING COST ELEMENTS	A&P	MR. CENTRAL	A&P	MR. CENTRAL
TRUCK LOADING:	.004916	.005244	.005210	.005244
PHYSICAL DELIVERY:	.022429	.027667	.022429	.027667
BRANCH CLERICAL COST:	.001062	.001505	.001643	.001505
PRODUCT WASTE:	.000000	.001044	.000000	.001044
BRANCH SELLING EXPENSE:	.000000	.016036	.000000	.016036
BORDEN LABEL ADVERTISING EXPENSE:	.000000	.000666	.000400	.000666
BORDEN LABEL MERCHANDISING EXPENSE:	.000000	.008630	.000000	.008630
SUB TOTAL:	.028407	.060792	.029682	.060792
GENERAL SELLING AND ADMINISTRATIVE EXPENSE AT 5.21%	.001480	.003167	.001546	.003167
TOTAL MARKETING COST:	.029837	.063959	.031229	.063959
MARKETING COST PER POINT IN EXCESS OF COST TO SERVE A&P:		.034072		.032730
AVERAGE LIST PRICE PER POINT:	.267400	.283800	.266200	.283800
AVERAGE DISCOUNT PER POINT:	36.57%	24.20%	32.56%	24.20%
VALUE OF DISCOUNT PER POINT:	.097788	.068680	.086675	.068680
DISCOUNT PER POINT LESS THAN A&P:		.029109		.017995
NET DIFFERENCE IN PRICE LESS NET DIFFERENCE IN MARKETING COST:		- .004963		- .014735
NET DISCRIMINATION IN FAVOR OF:		- .004963		- .014735

(1) A&P was compared to EACH of the 'complaint' customers, under two methods. Customer used for illustrative purposes in this display - MR. CENTRAL

000704 -778- A+P Proposed Findings of Fact

OVERVIEW OF DISCRIMINATION/JUSTIFICATION ANALYSIS, A&P VS. ALLEGEDLY DISCRIMINATED CUSTOMERS, O'HARE BRANCH, MARCH 1966. (1)

MARKETING COST ELEMENTS	BASED ON A&P PURCHASES OF P.L. ITEMS ONLY		BASED ON A&P PURCHASES OF TOTAL PVT. L. AND BORD. LABEL	
	A&P	MAYFAIR FOODS	A&P	MAYFAIR FOODS
TRUCK LOADING:	.004916	.005552	.005210	.005552
PHYSICAL DELIVERY:	.022429	.030500	.022429	.030500
BRANCH CLERICAL COST:	.001062	.001659	.001643	.001659
PRODUCT WASTE:	.000000	.001044	.000000	.001044
BRANCH SELLING EXPENSE:	.000000	.016036	.000000	.016036
BORDEN LABEL ADVERTISING EXPENSE:	.000000	.000666	.000400	.000666
BORDEN LABEL MERCHANDISING EXPENSE:	.000000	.008630	.000000	.008630
SUB TOTAL:	.028407	.064087	.029682	.064087
GENERAL SELLING AND ADMINISTRATIVE EXPENSE AT 5.21%	.001480	.003339	.001546	.003339
TOTAL MARKETING COST:	.029887	.067426	.031229	.067426
MARKETING COST PER POINT IN EXCESS OF COST TO SERVE A&P:		.037539		.036197
AVERAGE LIST PRICE PER POINT:	.267400	.258800	.266200	.258800
AVERAGE DISCOUNT PER POINT:	36.57%	30.00%	32.56%	30.00%
VALUE OF DISCOUNT PER POINT:	.097788	.077640	.086675	.077640
DISCOUNT PER POINT LESS THAN A&P:		.020148		.009035
NET DIFFERENCE IN PRICE LESS NET DIFFERENCE IN MARKETING COST:		- .017391		- .027163
NET DISCRIMINATION IN FAVOR OF:		- .017391		- .027163

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(1) A&P was compared to EACH of the 'complaint' customers, under two methods. Customer used for illustrative purposes in this display - MAYFAIR FOODS

000706

OVERVIEW OF DISCRIMINATION/JUSTIFICATION ANALYSIS, A&P VS. ALLEGEDLY DISCRIMINATED CUSTOMERS, O'HARE BRANCH, MARCH 1966. (1)

MARKETING COST ELEMENTS	BASED ON A&P PURCHASES OF P.L. ITEMS ONLY		BASED ON A&P PURCHASES OF TOTAL PVT. L. AND BORD. LABEL	
	A&P	JAMES COX	A&P	JAMES COX
TRUCK LOADING:	.004916	.005310	.005210	.005310
PHYSICAL DELIVERY:	.022429	.032512	.022429	.032512
BRANCH CLERICAL COST:	.001062	.001984	.001643	.001984
PRODUCT WASTE:	.000000	.001044	.000000	.001044
BRANCH SELLING EXPENSE:	.000000	.016036	.000000	.016036
BORDEN LABEL ADVERTISING EXPENSE:	.000000	.000666	.000400	.000666
BORDEN LABEL MERCHANDISING EXPENSE:	.000000	.008630	.000000	.008630
SUB TOTAL:	.028407	.066182	.029682	.066182
GENERAL SELLING AND ADMINISTRATIVE EXPENSE AT 5.21%	.001480	.003448	.001546	.003448
TOTAL MARKETING COST:	.029887	.069630	.031229	.069630
MARKETING COST PER POINT IN EXCESS OF COST TO SERVE A&P:		.039743		.038401
AVERAGE LIST PRICE PER POINT:	.267400	.269600	.266200	.269600
AVERAGE DISCOUNT PER POINT:	36.57%	22.80%	32.56%	22.80%
VALUE OF DISCOUNT PER POINT:	.097788	.061469	.086675	.061469
DISCOUNT PER POINT LESS THAN A&P:		.036319		.025206
NET DIFFERENCE IN PRICE LESS NET DIFFERENCE IN MARKETING COST:		- .003423		- .013195
NET DISCRIMINATION IN FAVOR OF:		- .003423		- .013195

(1) A&P was compared to EACH of the 'complaint' customers, under two methods. Customer used for illustrative purposes in this display - JAMES COX

A&P Proposed Findings of Fact -780-

OVERVIEW OF DISCRIMINATION/JUSTIFICATION ANALYSIS, A&P VS. ALLEGEDLY DISCRIMINATED CUSTOMERS, O'HARE BRANCH, MARCH 1966. (1)

MARKETING COST ELEMENTS	BASED ON A&P PURCHASES OF P.L. ITEMS ONLY		BASED ON A&P PURCHASES OF TOTAL PVT. L. AND BORD. LABEL	
	A&P	MISICKA'S FOODS	A&P	MISICKA'S FOODS
TRUCK LOADING:	.004916	.005626	.005210	.005626
PHYSICAL DELIVERY:	.022429	.039616	.022429	.039616
BRANCH CLERICAL COST:	.001062	.002901	.001643	.002901
PRODUCT WASTE:	.000000	.001044	.000000	.001044
BRANCH SELLING EXPENSE:	.000000	.016036	.000000	.016036
BORDEN LABEL ADVERTISING EXPENSE:	.000000	.000666	.000400	.000666
BORDEN LABEL MERCHANDISING EXPENSE:	.000000	.008630	.000000	.008630
SUB TOTAL:	.028407	.074520	.029682	.074520
GENERAL SELLING AND ADMINISTRATIVE EXPENSE AT 5.21%	.001480	.003883	.001546	.003883
TOTAL MARKETING COST:	.029887	.078403	.031229	.078403
MARKETING COST PER POINT IN EXCESS OF COST TO SERVE A&P:		.048515		.047174
AVERAGE LIST PRICE PER POINT:	.267400	.274600	.266200	.274600
AVERAGE DISCOUNT PER POINT:	36.57%	20.00%	32.56%	20.00%
VALUE OF DISCOUNT PER POINT:	.097788	.054920	.086675	.054920
DISCOUNT PER POINT LESS THAN A&P:		.042868		.031755
NET DIFFERENCE IN PRICE LESS NET DIFFERENCE IN MARKETING COST:		- .005647		- .015419
NET DISCRIMINATION IN FAVOR OF:		- .005647		- .015419

(1) A&P was compared to EACH of the 'complaint' customers, under two methods. Customer used for illustrative purposes in this display - MISICKA'S FOODS

OVERVIEW OF DISCRIMINATION/JUSTIFICATION ANALYSIS. A&P VS. ALLEGEDLY DISCRIMINATED CUSTOMERS, O'HARE BRANCH, MARCH 1966. (1)

MARKETING COST ELEMENTS	BASED ON A&P PURCHASES OF P.L. ITEMS ONLY		BASED ON A&P PURCHASES OF TOTAL PVT. L. AND BORD. LABEL	
	A&P	JOS. MICHALOWSKI	A&P	JOS. MICHALOWSKI
TRUCK LOADING:	.004916	.006478	.005210	.006478
PHYSICAL DELIVERY:	.022429	.037253	.022429	.037253
BRANCH CLERICAL COST:	.001062	.002570	.001643	.002570
PRODUCT WASTE:	.000000	.001044	.000000	.001044
BRANCH SELLING EXPENSE:	.000000	.016036	.000000	.016036
BORDEN LABEL ADVERTISING EXPENSE:	.000000	.000666	.000400	.000666
BORDEN LABEL MERCHANDISING EXPENSE:	.000000	.008630	.000000	.008630
SUB TOTAL:	.028407	.072678	.029682	.072678
GENERAL SELLING AND ADMINISTRATIVE EXPENSE AT 5.21%	.001480	.003787	.001546	.003787
TOTAL MARKETING COST:	.029887	.076464	.031229	.076464
MARKETING COST PER POINT IN EXCESS OF COST TO SERVE A&P:		.046577		.045235
AVERAGE LIST PRICE PER POINT:	.267400	.243200	.266200	.243200
AVERAGE DISCOUNT PER POINT:	36.57%	21.50%	32.56%	21.50%
VALUE OF DISCOUNT PER POINT:	.097788	.052288	.086675	.052288
DISCOUNT PER POINT LESS THAN A&P:		.045500		.034387
NET DIFFERENCE IN PRICE LESS NET DIFFERENCE IN MARKETING COST:		- .001077		- .010849
NET DISCRIMINATION IN FAVOR OF:		- .001077		- .010849

(1) A&P was compared to EACH of the 'complaint' customers, under two methods. Customer used for illustrative purposes in this display - JOS. MICHALOWSKI

OVERVIEW OF DISCRIMINATION/JUSTIFICATION ANALYSIS. A&P VS. ALLEGEDLY DISCRIMINATED CUSTOMERS. O'HARE BRANCH, MARCH 1966. (1)

MARKETING COST ELEMENTS	BASED ON A&P PURCHASES OF P.L. ITEMS ONLY		BASED ON A&P PURCHASES OF TOTAL PVT. L. AND BORD. LABEL	
	A&P	CARDINAL STORES	A&P	CARDINAL STORES
TRUCK LOADING:	.004916	.005433	.005210	.005433
PHYSICAL DELIVERY:	.022429	.041965	.022429	.041965
BRANCH CLERICAL COST:	.001062	.003074	.001643	.003074
PRODUCT WASTE:	.000000	.001044	.000000	.001044
BRANCH SELLING EXPENSE:	.000000	.016036	.000000	.016036
BORDEN LABEL ADVERTISING EXPENSE:	.000000	.000666	.000400	.000666
BORDEN LABEL MERCHANDISING EXPENSE:	.000000	.008630	.000000	.008630
SUB TOTAL:	.028407	.076848	.029682	.076848
GENERAL SELLING AND ADMINISTRATIVE EXPENSE AT 5.21%	.001480	.004004	.001546	.004004
TOTAL MARKETING COST:	.029887	.080852	.031229	.080852
MARKETING COST PER POINT IN EXCESS OF COST TO SERVE A&P:		.050964		.049623
AVERAGE LIST PRICE PER POINT:	.267400	.256700	.266200	.256700
AVERAGE DISCOUNT PER POINT:	36.57%	21.00%	32.56%	21.00%
VALUE OF DISCOUNT PER POINT:	.097788	.053907	.086675	.053907
DISCOUNT PER POINT LESS THAN A&P:		.043881		.032768
NET DIFFERENCE IN PRICE LESS NET DIFFERENCE IN MARKETING COST:		- .007083		- .016855
NET DISCRIMINATION IN FAVOR OF:		- .007083		- .016855

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(1) A&P was compared to EACH of the 'complaint' customers, under two methods. Customer used for illustrative purposes in this display - CARDINAL STORES

OVERVIEW OF DISCRIMINATION/JUSTIFICATION ANALYSIS, A&P VS. ALLEGEDLY DISCRIMINATED CUSTOMERS. O'HARE BRANCH, MARCH 1966. (1)

MARKETING COST ELEMENTS	BASED ON A&P PURCHASES OF P.L. ITEMS ONLY		BASED ON A&P PURCHASES OF TOTAL PVT. L. AND BORD. LABEL !	
	A&P	MADISON LAVEIGNE	A&P	MADISON LAVEIGNE
TRUCK LOADING:	.004916	.005390	.005210	.005390
PHYSICAL DELIVERY:	.022429	.048565	.022429	.048565
BRANCH CLERICAL COST:	.001062	.003557	.001643	.003557
PRODUCT WASTE:	.000000	.001044	.000000	.001044
BRANCH SELLING EXPENSE:	.000000	.016036	.000000	.016036
BORDEN LABEL ADVERTISING EXPENSE:	.000000	.000666	.000400	.000666
BORDEN LABEL MERCHANDISING EXPENSE:	.000000	.008630	.000000	.008630
SUB TOTAL:	.028407	.083888	.029682	.083888
GENERAL SELLING AND ADMINISTRATIVE EXPENSE AT 5.21%	.001480	.004371	.001546	.004371
TOTAL MARKETING COST:	.029887	.088259	.031229	.088259
MARKETING COST PER POINT IN EXCESS OF COST TO SERVE A&P:		.058371		.057030
AVERAGE LIST PRICE PER POINT:	.267400	.287000	.266200	.287000
AVERAGE DISCOUNT PER POINT:	36.57%	17.00%	32.56%	17.00%
VALUE OF DISCOUNT PER POINT:	.097788	.048790	.086675	.048790
DISCOUNT PER POINT LESS THAN A&P:		.048998		.037885
NET DIFFERENCE IN PRICE LESS NET DIFFERENCE IN MARKETING COST:		- .009373		- .019145
NET DISCRIMINATION IN FAVOR OF:		- .009373		- .019145

(1) A&P was compared to EACH of the 'complaint' customers, under two methods. Customer used for illustrative purposes in this display - MADISON LAVEIGNE

OVERVIEW OF DISCRIMINATION/JUSTIFICATION ANALYSIS, A&P VS. ALLEGEDLY DISCRIMINATED CUSTOMERS, O'HARE BRANCH, MARCH 1966. (1)

MARKETING COST ELEMENTS	BASED ON A&P PURCHASES OF P.L. ITEMS ONLY A&P	BEL PARK FOODS	BASED ON A&P PURCHASES OF TOTAL PVT. L. AND BORD. LABEL A&P	BEL PARK FOODS
TRUCK LOADING:	.004916	.005114	.005210	.005114
PHYSICAL DELIVERY:	.022429	.048336	.022429	.048336
BRANCH CLERICAL COST:	.001062	.003960	.001643	.003960
PRODUCT WASTE:	.000000	.001044	.000000	.001044
BRANCH SELLING EXPENSE:	.000000	.016036	.000000	.016036
BORDEN LABEL ADVERTISING EXPENSE:	.000000	.000666	.000400	.000666
BORDEN LABEL MERCHANDISING EXPENSE:	.000000	.008630	.000000	.008630
SUB TOTAL:	.028407	.083787	.029682	.083787
GENERAL SELLING AND ADMINISTRATIVE EXPENSE AT 5.21%	.001480	.004365	.001546	.004365
TOTAL MARKETING COST:	.029887	.088152	.031229	.088152
MARKETING COST PER POINT IN EXCESS OF COST TO SERVE A&P:		.058265		.056923
AVERAGE LIST PRICE PER POINT:	.267400	.291800	.266200	.291800
AVERAGE DISCOUNT PER POINT:	36.57%	20.30%	32.56%	20.30%
VALUE OF DISCOUNT PER POINT:	.097788	.059235	.086675	.059235
DISCOUNT PER POINT LESS THAN A&P:		.038553		.027439
NET DIFFERENCE IN PRICE LESS NET DIFFERENCE IN MARKETING COST:		- .019712		- .029484
NET DISCRIMINATION IN FAVOR OF:		- .019712		- .029484

(1) A&P was compared to EACH of the 'complaint' customers, under two methods. Customer used for illustrative purposes in this display - BEL PARK FOODS

OVERVIEW OF DISCRIMINATION/JUSTIFICATION ANALYSIS. A&P VS. ALLEGEDLY DISCRIMINATED CUSTOMERS, O'HARE BRANCH, MARCH 1966. (1)

MARKETING COST ELEMENTS	BASED ON A&P PURCHASES OF P.L. ITEMS ONLY		BASED ON A&P PURCHASES OF TOTAL PVT. L. AND BORD. LABEL	
	A&P	GREENVIEW FRUIT	A&P	GREENVIEW FRUIT
TRUCK LOADING:	.004916	.004650	.005210	.004650
PHYSICAL DELIVERY:	.022429	.048140	.022429	.048140
BRANCH CLERICAL COST:	.001062	.004026	.001643	.004026
PRODUCT WASTE:	.000000	.001044	.000000	.001044
BRANCH SELLING EXPENSE:	.000000	.016036	.000000	.016036
BORDEN LABEL ADVERTISING EXPENSE:	.000000	.000666	.000400	.000666
BORDEN LABEL MERCHANDISING EXPENSE:	.000000	.008630	.000000	.008630
SUB TOTAL:	.028407	.083192	.029682	.083192
GENERAL SELLING AND ADMINISTRATIVE EXPENSE AT 5.21%	.001480	.004334	.001546	.004334
TOTAL MARKETING COST:	.029887	.087527	.031229	.087527
MARKETING COST PER POINT IN EXCESS OF COST TO SERVE A&P:		.057639		.056298
AVERAGE LIST PRICE PER POINT:	.267400	.287600	.266200	.287600
AVERAGE DISCOUNT PER POINT:	36.57%	19.00%	32.56%	19.00%
VALUE OF DISCOUNT PER POINT:	.097788	.054644	.086675	.054644
DISCOUNT PER POINT LESS THAN A&P:		.043144		.032031
NET DIFFERENCE IN PRICE LESS NET DIFFERENCE IN MARKETING COST:		- .014495		- .024267
NET DISCRIMINATION IN FAVOR OF:		- .014495		- .024267

(1) A&P was compared to EACH of the 'complaint' customers, under two methods. Customer used for illustrative purposes in this display - GREENVIEW FRUIT

OVERVIEW OF DISCRIMINATION/JUSTIFICATION ANALYSIS, A&P VS. ALLEGEDLY DISCRIMINATED CUSTOMERS, O'HARE BRANCH, MARCH 1966. (1)

MARKETING COST ELEMENTS	BASED ON A&P PURCHASES OF P.L. ITEMS ONLY		BASED ON A&P PURCHASES OF TOTAL PVT. L. AND BORD. LABEL	
	A&P	STRICKLAND'S #159	A&P	STRICKLAND'S #15
TRUCK LOADING:	.004916	.005065	.005210	.005065
PHYSICAL DELIVERY:	.022429	.048053	.022429	.048053
BRANCH CLERICAL COST:	.001062	.003937	.001643	.003937
PRODUCT WASTE:	.000000	.001044	.000000	.001044
BRANCH SELLING EXPENSE:	.000000	.016036	.000000	.016036
BORDEN LABEL ADVERTISING EXPENSE:	.000000	.000666	.000400	.000666
BORDEN LABEL MERCHANDISING EXPENSE:	.000000	.008630	.000000	.008630
SUB TOTAL:	.028407	.083432	.029682	.083432
GENERAL SELLING AND ADMINISTRATIVE EXPENSE AT 5.21%	.001480	.004347	.001546	.004347
TOTAL MARKETING COST:	.029887	.087779	.031229	.087779
MARKETING COST PER POINT IN EXCESS OF COST TO SERVE A&P:		.057891		.056550
AVERAGE LIST PRICE PER POINT:	.267400	.275500	.266200	.275500
AVERAGE DISCOUNT PER POINT:	36.57%	23.00%	32.56%	23.00%
VALUE OF DISCOUNT PER POINT:	.097788	.063365	.086675	.063365
DISCOUNT PER POINT LESS THAN A&P:		.034423		.023310
NET DIFFERENCE IN PRICE LESS NET DIFFERENCE IN MARKETING COST:		- .023468		- .033240
NET DISCRIMINATION IN FAVOR OF:		- .023468		- .033240

(1) A&P was compared to EACH of the 'complaint' customers, under two methods. Customer used for illustrative purposes in this display - STRICKLAND'S #159

OVERVIEW OF DISCRIMINATION/JUSTIFICATION ANALYSIS, A&P VS. ALLEGEDLY DISCRIMINATED CUSTOMERS, O'HARE BRANCH, MARCH 1966. (1)

MARKETING COST ELEMENTS	BASED ON A&P PURCHASES OF P.L. ITEMS ONLY		BASED ON A&P PURCHASES OF TOTAL PVT. L. AND BORD. LABEL	
	A&P	ROBERT BATTALI	A&P	ROBERT BATTALI
TRUCK LOADING:	.004916	.006541	.005210	.006541
PHYSICAL DELIVERY:	.022429	.046204	.022429	.046204
BRANCH CLERICAL COST:	.001062	.003384	.001643	.003384
PRODUCT WASTE:	.000000	.001044	.000000	.001044
BRANCH SELLING EXPENSE:	.000000	.016036	.000000	.016036
BORDEN LABEL ADVERTISING EXPENSE:	.000000	.000666	.000400	.000666
BORDEN LABEL MERCHANDISING EXPENSE:	.000000	.008630	.000000	.008630
SUB TOTAL:	.028407	.082505	.029682	.082505
GENERAL SELLING AND ADMINISTRATIVE EXPENSE AT 5.21%	.001480	.004299	.001546	.004299
TOTAL MARKETING COST:	.029887	.086804	.031229	.086804
MARKETING COST PER POINT IN EXCESS OF COST TO SERVE A&P:		.056917		.055575
AVERAGE LIST PRICE PER POINT:	.267400	.230900	.266200	.230900
AVERAGE DISCOUNT PER POINT:	36.57%	21.00%	32.56%	21.00%
VALUE OF DISCOUNT PER POINT:	.097788	.048489	.086675	.048489
DISCOUNT PER POINT LESS THAN A&P:		.049299		.038186
NET DIFFERENCE IN PRICE LESS NET DIFFERENCE IN MARKETING COST:		- .007617		- .017389
NET DISCRIMINATION IN FAVOR OF:		- .007617		- .017389

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(1) A&P was compared to EACH of the 'complaint' customers, under two methods. Customer used for illustrative purposes in this display - ROBERT BATTALI

OVERVIEW OF DISCRIMINATION/JUSTIFICATION ANALYSIS, A&P VS. ALLEGEDLY DISCRIMINATED CUSTOMERS, O'HARE BRANCH, MARCH 1966. (1)

MARKETING COST ELEMENTS	BASED ON A&P PURCHASES OF P.L. ITEMS ONLY A&P	 EDWARD MARSZAICK	BASED ON A&P PURCHASES OF TOTAL PVT. L. AND BORD. LABEL A&P	 EDWARD MARZAICK
TRUCK LOADING:	.004916	.005778	.005210	.005778
PHYSICAL DELIVERY:	.022429	.048074	.022429	.048074
BRANCH CLERICAL COST:	.001062	.003939	.001643	.003939
PRODUCT WASTE:	.000000	.001044	.000000	.001044
BRANCH SELLING EXPENSE:	.000000	.016036	.000000	.016036
BORDEN LABEL ADVERTISING EXPENSE:	.000000	.000666	.000400	.000666
BORDEN LABEL MERCHANDISING EXPENSE:	.000000	.008630	.000000	.008630
SUB TOTAL:	.028407	.084167	.029682	.084167
GENERAL SELLING AND ADMINISTRATIVE EXPENSE AT 5.21%	.001480	.004385	.001546	.004385
TOTAL MARKETING COST:	.029887	.088552	.031229	.088552
MARKETING COST PER POINT IN EXCESS OF COST TO SERVE A&P:		.058665		.057323
AVERAGE LIST PRICE PER POINT:	.267400	.264000	.266200	.264000
AVERAGE DISCOUNT PER POINT:	36.57%	14.40% (2)	32.56%	14.40% (2)
VALUE OF DISCOUNT PER POINT:	.097788	.038016 (2)	.086675	.038016 (2)
DISCOUNT PER POINT LESS THAN A&P:		.059772 (3)		.048659 (3)
NET DIFFERENCE IN PRICE LESS NET DIFFERENCE IN MARKETING COST:		.001107 (4)		- .008665 (4)
NET DISCRIMINATION IN FAVOR OF:	.001107 (4)			- .008665 (4)

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(1) A&P was compared to EACH of the "complaint" customers, under two methods. Customer used for illustrative purposes in this display - EDWARD MARSZAICK

(2) The discount of 14.4% was calculated in CX-183, which was based on rebate memoranda discovered by complaint counsel. The minimum discount offered customers who purchased 151-200 points per delivery under Borden's discount schedule, CX-138, was 15.0%. The value per point of the 15.0% discount for this customer would be .039600(.2640 x .15).

(3) If this customer actually received the discount of .039600 per point indicated by Borden's discount schedule, CX-138, the discount per point less than A&P would have been .058188 compared to A&P private label points and .047075 compared to A&P's Total purchases of private label and Borden label points.

(4) Subtracting the additional marketing cost per point incurred by Borden to serve this customer from the value per point of additional discount received by A&P would be -.000477 per point on A&P's purchases of private label points and -.010249 on A&P's total purchases of Borden label points. In both comparisons the additional cost per point incurred by Borden to serve this customer would be greater than the value per point of the additional discount granted A&P, therefore the net discrimination would be in favor of this allegedly injured customer.

OVERVIEW OF DISCRIMINATION/JUSTIFICATION ANALYSIS, A&P VS. ALLEGEDLY DISCRIMINATED CUSTOMERS, O'HARE BRANCH, MARCH 1966. (1)

MARKETING COST ELEMENTS	BASED ON A&P PURCHASES OF P.L. ITEMS ONLY A&P	 BILL'S MARKET #194	BASED ON A&P PURCHASES OF TOTAL PVT. L. AND BORD. LABEL A&P	 BILL'S MARKET #194
TRUCK LOADING:	.004916	.004954	.005210	.004954
PHYSICAL DELIVERY:	.022429	.049084	.022429	.049084
BRANCH CLERICAL COST:	.001062	.004105	.001643	.004105
PRODUCT WASTE:	.000000	.001044	.000000	.001044
BRANCH SELLING EXPENSE:	.000000	.016036	.000000	.016036
BORDEN LABEL ADVERTISING EXPENSE:	.000000	.000666	.000400	.000666
BORDEN LABEL MERCHANDISING EXPENSE:	.000000	.008630	.000000	.008630
SUB TOTAL:	.028407	.084520	.029682	.084520
GENERAL SELLING AND ADMINISTRATIVE EXPENSE AT 5.21%	.001480	.004404	.001546	.004404
TOTAL MARKETING COST:	.029887	.088924	.031229	.088924
MARKETING COST PER POINT IN EXCESS OF COST TO SERVE A&P:		.059036		.057695
AVERAGE LIST PRICE PER POINT:	.267400	.272000	.266200	.272000
AVERAGE DISCOUNT PER POINT:	36.57%	25.00%	32.56%	25.00%
VALUE OF DISCOUNT PER POINT:	.097788	.068000	.086675	.068000
DISCOUNT PER POINT LESS THAN A&P:		.029788		.018675
NET DIFFERENCE IN PRICE LESS NET DIFFERENCE IN MARKETING COST:		- .029248		- .039020
NET DISCRIMINATION IN FAVOR OF:		- .029248		- .039020

A&P Proposed Findings of Fact -790- 000716

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(1) A&P was compared to EACH of the 'complaint' customers, under two methods. Customer used for illustrative purposes in this display - BILL'S MARKET #194

OVERVIEW OF DISCRIMINATION/JUSTIFICATION ANALYSIS, A&P VS. ALLEGEDLY DISCRIMINATED CUSTOMERS, O'HARE BRANCH, MARCH 1966. (1)

MARKETING COST ELEMENTS	BASED ON A&P PURCHASES OF P.L. ITEMS ONLY		BASED ON A&P PURCHASES OF TOTAL PVT. L. AND BORD. LABEL	
	A&P	GENE'S FOOD SHOP	A&P	GENE'S FOOD SHOP
TRUCK LOADING:	.004916	.005621	.005210	.005621
PHYSICAL DELIVERY:	.022429	.047014	.022429	.047014
BRANCH CLERICAL COST:	.001062	.003443	.001643	.003443
PRODUCT WASTE:	.000000	.001044	.000000	.001044
BRANCH SELLING EXPENSE:	.000000	.016036	.000000	.016036
BORDEN LABEL ADVERTISING EXPENSE:	.000000	.000666	.000400	.000666
BORDEN LABEL MERCHANDISING EXPENSE:	.000000	.008630	.000000	.008630
SUB TOTAL:	.028407	.082454	.029682	.082454
GENERAL SELLING AND ADMINISTRATIVE EXPENSE AT 5.21%	.001480	.004296	.001546	.004296
TOTAL MARKETING COST:	.029887	.086750	.031229	.086750
MARKETING COST PER POINT IN EXCESS OF COST TO SERVE A&P:		.056863		.055521
AVERAGE LIST PRICE PER POINT:	.267400	.261300	.266200	.261300
AVERAGE DISCOUNT PER POINT:	36.57%	27.00%	32.56%	27.00%
VALUE OF DISCOUNT PER POINT:	.097788	.070551	.086675	.070551
DISCOUNT PER POINT LESS THAN A&P:		.027237		.016124
NET DIFFERENCE IN PRICE LESS NET DIFFERENCE IN MARKETING COST:		- .029626		- .039398
NET DISCRIMINATION IN FAVOR OF:		- .029626		- .039398

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(1) A&P was compared to EACH of the 'complaint' customers, under two methods. Customer used for illustrative purposes in this display - GENE'S FOOD SHOP

OVERVIEW OF DISCRIMINATION/JUSTIFICATION ANALYSIS, A&P VS. ALLEGEDLY DISCRIMINATED CUSTOMERS, O'HARE BRANCH, MARCH 1966. (1)

MARKETING COST ELEMENTS	BASED ON A&P PURCHASES OF P.L. ITEMS ONLY		BASED ON A&P PURCHASES OF TOTAL PVT. L. AND BORD. LABEL	
	A&P	SPOT LITE MARKET	A&P	SPOT LITE MARKET
TRUCK LOADING:	.004916	.006695	.005210	.006695
PHYSICAL DELIVERY:	.022429	.048730	.022429	.048730
BRANCH CLERICAL COST:	.001062	.003569	.001643	.003569
PRODUCT WASTE:	.000000	.001044	.000000	.001044
BRANCH SELLING EXPENSE:	.000000	.016036	.000000	.016036
BORDEN LABEL ADVERTISING EXPENSE:	.000000	.000666	.000400	.000666
BORDEN LABEL MERCHANDISING EXPENSE:	.000000	.008630	.000000	.008630
SUB TOTAL:	.028407	.085370	.029682	.085370
GENERAL SELLING AND ADMINISTRATIVE EXPENSE AT 5.21%	.001480	.004448	.001546	.004448
TOTAL MARKETING COST:	.029887	.089818	.031229	.089818
MARKETING COST PER POINT IN EXCESS OF COST TO SERVE A&P:		.059931		.058589
AVERAGE LIST PRICE PER POINT:	.267400	.225000	.266200	.225000
AVERAGE DISCOUNT PER POINT:	36.57%	22.00%	32.56%	22.00%
VALUE OF DISCOUNT PER POINT:	.097788	.049500	.086675	.049500
DISCOUNT PER POINT LESS THAN A&P:		.048288		.037175
NET DIFFERENCE IN PRICE LESS NET DIFFERENCE IN MARKETING COST:		- .011643		- .021415
NET DISCRIMINATION IN FAVOR OF:		- .011643		- .021415

A&P Proposed Findings of Fact -792- 000718

(1) A&P was compared to EACH of the 'complaint' customers, under two methods. Customer used for illustrative purposes in this display - SPOT LITE MARKET

OVERVIEW OF DISCRIMINATION/JUSTIFICATION ANALYSIS, A&P VS. ALLEGEDLY DISCRIMINATED CUSTOMERS, O'HARE BRANCH, MARCH 1966. (1)

MARKETING COST ELEMENTS	BASED ON A&P PURCHASES OF P.L. ITEMS ONLY A&P	THERESA CRISPINO	BASED ON A&P PURCHASES OF TOTAL PVT. L. AND BORD. LABEL A&P	THERESA CRISPINO
TRUCK LOADING:	.004916	.005674	.005210	.005674
PHYSICAL DELIVERY:	.022429	.050079	.022429	.050079
BRANCH CLERICAL COST:	.001062	.004189	.001643	.004189
PRODUCT WASTE:	.000000	.001044	.000000	.001044
BRANCH SELLING EXPENSE:	.000000	.016036	.000000	.016036
BORDEN LABEL ADVERTISING EXPENSE:	.000000	.000666	.000400	.000656
BORDEN LABEL MERCHANDISING EXPENSE:	.000000	.008630	.000000	.008630
SUB TOTAL:	.028407	.086318	.029682	.086318
GENERAL SELLING AND ADMINISTRATIVE EXPENSE AT 5.21%	.001480	.004497	.001546	.004497
TOTAL MARKETING COST:	.029887	.090815	.031229	.090815
MARKETING COST PER POINT IN EXCESS OF COST TO SERVE A&P:		.060927		.059586
AVERAGE LIST PRICE PER POINT:	.267400	.260900	.266200	.260900
AVERAGE DISCOUNT PER POINT:	36.57%	20.70%	32.56%	20.70%
VALUE OF DISCOUNT PER POINT:	.097788	.054006	.086675	.054006
DISCOUNT PER POINT LESS THAN A&P:		.043782		.032668
NET DIFFERENCE IN PRICE LESS NET DIFFERENCE IN MARKETING COST:		- .017146		- .026917
NET DISCRIMINATION IN FAVOR OF:		- .017146		- .026917

(1) A&P was compared to EACH of the 'complaint' customers, under two methods. Customer used for illustrative purposes in this display - THERESA CRISPINO

OVERVIEW OF DISCRIMINATION/JUSTIFICATION ANALYSIS, A&P VS. ALLEGEDLY DISCRIMINATED CUSTOMERS, O'HARE BRANCH, MARCH 1966. (1)

MARKETING COST ELEMENTS	BASED ON A&P PURCHASES OF P.L. ITEMS ONLY		BASED ON A&P PURCHASES OF TOTAL PVT. L. AND BORD. LABEL	
	A&P	FOREST FOOD MART	A&P	FOREST FOOD MART
TRUCK LOADING:	.004916	.004823	.005210	.004823
PHYSICAL DELIVERY:	.022429	.051675	.022429	.051675
BRANCH CLERICAL COST:	.001062	.004566	.001643	.004566
PRODUCT WASTE:	.000000	.001044	.000000	.001044
BRANCH SELLING EXPENSE:	.000000	.016036	.000000	.016036
BORDEN LABEL ADVERTISING EXPENSE:	.000000	.000666	.000400	.000666
BORDEN LABEL MERCHANDISING EXPENSE:	.000000	.008630	.000000	.008630
SUB TOTAL:	.028407	.087440	.029682	.087440
GENERAL SELLING AND ADMINISTRATIVE EXPENSE AT 5.21%	.001480	.004556	.001546	.004556
TOTAL MARKETING COST:	.029887	.091995	.031229	.091995
MARKETING COST PER POINT IN EXCESS OF COST TO SERVE A&P:		.062108		.060766
AVERAGE LIST PRICE PER POINT:	.267400	.273800	.266200	.273800
AVERAGE DISCOUNT PER POINT:	36.57%	18.40%	32.56%	18.40%
VALUE OF DISCOUNT PER POINT:	.097788	.050379	.086675	.050379
DISCOUNT PER POINT LESS THAN A&P:		.047409		.036296
NET DIFFERENCE IN PRICE LESS NET DIFFERENCE IN MARKETING COST:		- .014699		- .024471
NET DISCRIMINATION IN FAVOR OF:		- .014699		- .024471

(1) A&P was compared to EACH of the 'complaint' customers, under two methods. Customer used for illustrative purposes in this display - FOREST FOOD MART

OVERVIEW OF DISCRIMINATION/JUSTIFICATION ANALYSIS, A&P VS. ALLEGEDLY DISCRIMINATED CUSTOMERS, O'HARE BRANCH, MARCH 1966. (1)

MARKETING COST ELEMENTS	BASED ON A&P PURCHASES OF P.L. ITEMS ONLY		BASED ON A&P PURCHASES OF TOTAL PVT. L. AND BORD. LABEL	
	A&P	STRICKLAND'S #256	A&P	STRICKLAND'S #256
TRUCK LOADING:	.004916	.004654	.005210	.004654
PHYSICAL DELIVERY:	.022429	.056948	.022429	.056948
BRANCH CLERICAL COST:	.001062	.005348	.001643	.005348
PRODUCT WASTE:	.000000	.001044	.000000	.001044
BRANCH SELLING EXPENSE:	.000000	.016036	.000000	.016036
BORDEN LABEL ADVERTISING EXPENSE:	.000000	.000666	.000400	.000666
BORDEN LABEL MERCHANDISING EXPENSE:	.000000	.008630	.000000	.008630
SUB TOTAL:	.028407	.093326	.029682	.093326
GENERAL SELLING AND ADMINISTRATIVE EXPENSE AT 5.21%	.001480	.004862	.001546	.004862
TOTAL MARKETING COST:	.029887	.098188	.031229	.098188
MARKETING COST PER POINT IN EXCESS OF COST TO SERVE A&P:		.068301		.066959
AVERAGE LIST PRICE PER POINT:	.267400	.317500	.266200	.317500
AVERAGE DISCOUNT PER POINT:	36.57%	23.00%	32.56%	23.00%
VALUE OF DISCOUNT PER POINT:	.097768	.073025	.086675	.073025
DISCOUNT PER POINT LESS THAN A&P:		.024763		.013650
NET DIFFERENCE IN PRICE LESS NET DIFFERENCE IN MARKETING COST:		- .043538		- .053309
NET DISCRIMINATION IN FAVOR OF:		- .043538		- .053309

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(1) A&P was compared to EACH of the 'complaint' customers, under two methods. Customer used for illustrative purposes in this display - STRICKLAND'S #256

A+P Proposed Findings of Fact -795- 000721

OVERVIEW OF DISCRIMINATION/JUSTIFICATION ANALYSIS, A&P VS. ALLEGEDLY DISCRIMINATED CUSTOMERS, O'HARE BRANCH, MARCH 1966. (1)

MARKETING COST ELEMENTS	BASED ON A&P PURCHASES OF P.L. ITEMS ONLY		BASED ON A&P PURCHASES OF TOTAL PVT. L. AND BORD. LABEL	
	A&P	CONGRESS FOOD	A&P	CONGRESS FOOD
TRUCK LOADING:	.004916	.005517	.005210	.005517
PHYSICAL DELIVERY:	.022429	.052523	.022429	.052523
BRANCH CLERICAL COST:	.001062	.004641	.001643	.004641
PRODUCT WASTE:	.000000	.001044	.000000	.001044
BRANCH SELLING EXPENSE:	.000000	.016036	.000000	.016036
BORDEN LABEL ADVERTISING EXPENSE:	.000000	.000666	.000400	.000666
BORDEN LABEL MERCHANDISING EXPENSE:	.000000	.008630	.000000	.008630
SUB TOTAL:	.028407	.089057	.029682	.089057
GENERAL SELLING AND ADMINISTRATIVE EXPENSE AT 5.21%	.001480	.004640	.001546	.004640
TOTAL MARKETING COST:	.029887	.093697	.031229	.093697
MARKETING COST PER POINT IN EXCESS OF COST TO SERVE A&P:		.063809		.062468
AVERAGE LIST PRICE PER POINT:	.267400	.269000	.266200	.269000
AVERAGE DISCOUNT PER POINT:	36.57%	20.50%	32.56%	20.50%
VALUE OF DISCOUNT PER POINT:	.097786	.055145	.086675	.055145
DISCOUNT PER POINT LESS THAN A&P:		.042643		.031530
NET DIFFERENCE IN PRICE LESS NET DIFFERENCE IN MARKETING COST:		- .021166		- .030938
NET DISCRIMINATION IN FAVOR OF:		- .021166		- .030938

A+P Proposed Findings of Fact -796 - 000722

(1) A&P was compared to EACH of the 'complaint' customers, under two methods. Customer used for illustrative purposes in this display - CONGRESS FOOD

OVERVIEW OF DISCRIMINATION/JUSTIFICATION ANALYSIS, A&P VS. ALLEGEDLY DISCRIMINATED CUSTOMERS, O'HARE BRANCH, MARCH 1966. (1)

MARKETING COST ELEMENTS	BASED ON A&P PURCHASES OF P.L. ITEMS ONLY		BASED ON A&P PURCHASES OF TOTAL PVT. L. AND BORD. LABEL	
	A&P	FLOOM BROS.	A&P	FLOOM BROS.
TRUCK LOADING:	.004916	.005195	.005210	.005195
PHYSICAL DELIVERY:	.022429	.054235	.022429	.054235
BRANCH CLERICAL COST:	.001062	.004792	.001643	.004792
PRODUCT WASTE:	.000000	.001044	.000000	.001044
BRANCH SELLING EXPENSE:	.000000	.016036	.000000	.016036
BORDEN LABEL ADVERTISING EXPENSE:	.000000	.000666	.000400	.000666
BORDEN LABEL MERCHANDISING EXPENSE:	.000000	.008630	.000000	.008630
SUB TOTAL:	.028407	.090598	.029682	.090598
GENERAL SELLING AND ADMINISTRATIVE EXPENSE AT 5.21%	.001480	.004720	.001546	.004720
TOTAL MARKETING COST:	.029887	.095319	.031229	.095319
MARKETING COST PER POINT IN EXCESS OF COST TO SERVE A&P:		.065431		.064090
AVERAGE LIST PRICE PER POINT:	.267400	.270200	.266200	.270200
AVERAGE DISCOUNT PER POINT:	36.57%	17.00%	32.56%	17.00%
VALUE OF DISCOUNT PER POINT:	.097788	.045934	.086675	.045934
DISCOUNT PER POINT LESS THAN A&P:		.051854		.040741
NET DIFFERENCE IN PRICE LESS NET DIFFERENCE IN MARKETING COST:		- .013577		- .023349
NET DISCRIMINATION IN FAVOR OF:		- .013577		- .023349

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(1) A&P was compared to EACH of the 'complaint' customers, under two methods. Customer used for illustrative purposes in this display - FLOOM BROS.

OVERVIEW OF DISCRIMINATION/JUSTIFICATION ANALYSIS. A&P VS. ALLEGEDLY DISCRIMINATED CUSTOMERS. O'HARE BRANCH, MARCH 1966. (1)

MARKETING COST ELEMENTS	BASED ON A&P PURCHASES OF P.L. ITEMS ONLY		BASED ON A&P PURCHASES OF TOTAL PVT. L. AND HOPE. LABEL	
	A&P	JOS. BERLIN & SON	A&P	JOS. BERLIN & S
TRUCK LOADING:	.004916	.005059	.005210	.005059
PHYSICAL DELIVERY:	.022429	.056789	.022429	.056789
BRANCH CLERICAL COST:	.001062	.005334	.001643	.005334
PRODUCT WASTE:	.000000	.001044	.000000	.001044
BRANCH SELLING EXPENSE:	.000000	.016036	.000000	.016036
BORDEN LABEL ADVERTISING EXPENSE:	.000000	.000666	.000400	.000666
BORDEN LABEL MERCHANDISING EXPENSE:	.000000	.008630	.000000	.008630
SUB TOTAL:	.028407	.093557	.029652	.093557
GENERAL SELLING AND ADMINISTRATIVE EXPENSE AT 5.21%	.001480	.004874	.001546	.004874
TOTAL MARKETING COST:	.029887	.098432	.031229	.098432
MARKETING COST PER POINT IN EXCESS OF COST TO SERVE A&P:		.068544		.067203
AVERAGE LIST PRICE PER POINT:	.267400	.276300	.266200	.276300
AVERAGE DISCOUNT PER POINT:	36.57%	14.80%	32.56%	14.80%
VALUE OF DISCOUNT PER POINT:	.097788	.040892	.086675	.040892
DISCOUNT PER POINT LESS THAN A&P:		.056896		.045782
NET DIFFERENCE IN PRICE LESS NET DIFFERENCE IN MARKETING COST:		- .011648		- .021420
NET DISCRIMINATION IN FAVOR OF:		- .011648		- .021420

A&P Proposed Findings of Fact -798- 000724

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(1) A&P was compared to EACH of the 'complaint' customers, under two methods. Customer used for illustrative purposes in this display - JOS. BERLIN & SON

OVERVIEW OF DISCRIMINATION/JUSTIFICATION ANALYSIS, A&P VS. ALLEGEDLY DISCRIMINATED CUSTOMERS, O'HARE BRANCH, MARCH 1966. (1)

	BASED ON A&P PURCHASES P.L. ITEMS ONLY			BASED ON A&P PURCHASES OF TOTAL PRVT. L. AND BORD. LABEL		
MARKETING COST ELEMENTS	A&P	BRUNO NALEPA		A&P	BRUNO NALEPA	
TRUCK LOADING:	.004916	.006111		.005210	.006111	
PHYSICAL DELIVERY:	.022429	.054238		.022429	.054238	
BRANCH CLERICAL COST:	.001062	.004792		.001643	.004792	
PRODUCT WASTE:	.000000	.001044		.000000	.001044	
BRANCH SELLING EXPENSE:	.000000	.016036		.000000	.016036	
BORDEN LABEL ADVERTISING EXPENSE:	.000000	.000666		.000400	.000666	
BORDEN LABEL MERCHANDISING EXPENSE:	.000000	.008630		.000000	.008630	
SUB TOTAL:	.028407	.091518		.029682	.091518	
GENERAL SELLING AND ADMINISTRATIVE EXPENSE AT 5.21%	.001480	.004768		.001546	.004768	
TOTAL MARKETING COST:	.029887	.096286		.031229	.096286	
MARKETING COST PER POINT IN EXCESS OF COST TO SERVE A&P:		.066398			.065057	
AVERAGE LIST PRICE PER POINT:	.267400	.0248200		.266200	.248200	
AVERAGE DISCOUNT PER POINT:	36.57%	13.00%	(2)	32.56%	13.00%	(2)
VALUE OF DISCOUNT PER POINT:	.097788	.032266	(2)	.086675	.032266	(2)
DISCOUNT PER POINT LESS THAN A&P:		.065522	(3)		.054409	(3)
NET DIFFERENCE IN PRICE LESS NET DIFFERENCE IN MARKETING COST:		- .000877	(4)		- .010648	(4)
NET DISCRIMINATION IN FAVOR OF:		- .000876	(4)		- .010648	(4)

(1) A&P was compared to EACH of the 'complaint' customers, under two methods. Customer used for illustrative purposes in this display - BRUNO NALEPA

(2) The discount of 13.0% was calculated in CX-183, which was based on rebate memoranda discovered by complaint counsel. The minimum discount offered customers who purchased 151-200 points per delivery under Borden's discount schedule, CX-138, was 15.0%. The value per point of the 15.0% discount for this customer would be .037230 (.2482 x .15).

(3) If this customer actually received the discount of .037230 per point indicated by Borden's discount schedule, CX-138, the discount per point less than A&P would have been .060558 compared to A&P private label points and .049445 compared to A&P's Total purchases of private label and Borden label points.

(4) Subtracting the additional marketing cost per point incurred by Borden to serve this customer from the value per point of additional discount received by A&P would be -.005840 per point on A&P's purchases of private label points and -.015612 on A&P's total purchases of Borden label points. In both comparisons the additional cost per point incurred by Borden to serve this customer would be greater than the value per point of the additional discount granted A&P, therefore the net discrimination would be in favor of this allegedly injured customer.

OVERVIEW OF DISCRIMINATION/JUSTIFICATION ANALYSIS, A&P VS. ALLEGEDLY DISCRIMINATED CUSTOMERS, O'HARE BRANCH, MARCH 1966. (1)

MARKETING COST ELEMENTS	BASED ON A&P PURCHASES OF P.L. ITEMS ONLY		BASED ON A&P PURCHASES OF TOTAL PVT. L. AND BORD. LABEL	
	A&P	BLANCHE'S FOODS	A&P	BLANCHE'S FOODS
TRUCK LOADING:	.004916	.006288	.005210	.006288
PHYSICAL DELIVERY:	.22429	.055743	.022429	.055743
BRANCH CLERICAL COST:	.001062	.005083	.001643	.005083
PRODUCT WASTE:	.000000	.001044	.000000	.001044
BRANCH SELLING EXPENSE:	.000000	.016036	.000000	.016036
BORDEN LABEL ADVERTISING EXPENSE:	.000000	.000666	.000400	.000666
BORDEN LABEL MERCHANDISING EXPENSE:	.000000	.008630	.000000	.008630
SUB TOTAL:	.028407	.093490	.029682	.093490
GENERAL SELLING AND ADMINISTRATIVE EXPENSE AT 5.21%	.001480	.004871	.001546	.004871
TOTAL MARKETING COST:	.029887	.098361	.031229	.098361
MARKETING COST PER POINT IN EXCESS OF COST TO SERVE A&P:		.068474		.067132
AVERAGE LIST PRICE PER POINT:	.267400	.250800	.266200	.250800
AVERAGE DISCOUNT PER POINT:	36.57%	14.10%	32.56%	14.10%
VALUE OF DISCOUNT PER POINT:	.097788	.035363	.084675	.035363
DISCOUNT PER POINT LESS THAN A&P:		.062425		.051342
NET DIFFERENCE IN PRICE LESS NET DIFFERENCE IN MARKETING COST:		- .006049		- .015820
NET DISCRIMINATION IN FAVOR OF:		- .006039		- .015820

(1) A&P was compared to EACH of the 'complaint' customers, under two methods. Customer used for illustrative purposes in this display - BLANCHE'S FOODS

A+P Proposed Findings of Fact -800- 000726

OVERVIEW OF DISCRIMINATION/JUSTIFICATION ANALYSIS, A&P VS. ALLEGEDLY DISCRIMINATED CUSTOMERS, O'HARE BRANCH, MARCH 1966. (1)

MARKETING COST ELEMENTS	BASED ON A&P PURCHASES OF P.L. ITEMS ONLY		BASED ON A&P PURCHASES OF TOTAL PVT. L. AND BORD. LABEL	
	A&P	EDWARD TRUTY	A&P	EDWARD TRUTY
TRUCK LOADING:	.004916	.006114	.005210	.006111
PHYSICAL DELIVERY:	.022429	.054310	.022429	.054310
BRANCH CLERICAL COST:	.001062	.004951	.001643	.004951
PRODUCT WASTE:	.000000	.001044	.000000	.001044
BRANCH SELLING EXPENSE:	.000000	.016036	.000000	.016036
BORDEN LABEL ADVERTISING EXPENSE:	.000000	.000666	.000400	.000666
BORDEN LABEL MERCHANDISING EXPENSE:	.000000	.008630	.000000	.008630
SUB TOTAL:	.028407	.091749	.029682	.091749
GENERAL SELLING AND ADMINISTRATIVE EXPENSE AT 5.21%	.001480	.004780	.001546	.004780
TOTAL MARKETING COST:	.029887	.096529	.031229	.096529
MARKETING COST PER POINT IN EXCESS OF COST TO SERVE A&P:		.066642		.065300
AVERAGE LIST PRICE PER POINT:	.267400	.243700	.266200	.243700
AVERAGE DISCOUNT PER POINT:	36.57%	15.70%	32.56%	15.70%
VALUE OF DISCOUNT PER POINT:	.097788	.038261	.086675	.038261
DISCOUNT PER POINT LESS THAN A&P:		.059527		.048414
NET DIFFERENCE IN PRICE LESS NET DIFFERENCE IN MARKETING COST:		- .007114		- .016886
NET DISCRIMINATION IN FAVOR OF:		- .007114		- .016886

(1) A&P was compared to EACH of the 'complaint' customers, under two methods. Customer used for illustrative purposes in this display - EDWARD TRUTY

OVERVIEW OF DISCRIMINATION/JUSTIFICATION ANALYSIS, A&P VS. ALLEGEDLY DISCRIMINATED CUSTOMERS, O'HARE BRANCH, MARCH 1966. (1)

MARKETING COST ELEMENTS	BASED ON A&P PURCHASES OF P.L. ITEMS ONLY A&P	BASED ON A&P PURCHASES OF P.L. ITEMS ONLY BARNEY TRAINOR	BASED ON A&P PURCHASES OF TOTAL PVT. L. AND BORD. LABEL A&P	BASED ON A&P PURCHASES OF TOTAL PVT. L. AND BORD. LABEL BARNEY TRAINOR
TRUCK LOADING:	.004916	.005572	.005210	.005572
PHYSICAL DELIVERY:	.022429	.057555	.022429	.057555
BRANCH CLERICAL COST:	.001062	.005606	.001643	.005606
PRODUCT WASTE:	.000000	.001044	.000000	.001044
BRANCH SELLING EXPENSE:	.000000	.016036	.000000	.016036
BORDEN LABEL ADVERTISING EXPENSE:	.000000	.000666	.000400	.000666
BORDEN LABEL MERCHANDISING EXPENSE:	.000000	.008630	.000000	.008630
SUB TOTAL:	.028407	.095109	.029682	.095109
GENERAL SELLING AND ADMINISTRATIVE EXPENSE AT 5.21%	.001480	.004955	.001546	.004955
TOTAL MARKETING COST:	.029887	.100064	.031229	.100064
MARKETING COST PER POINT IN EXCESS OF COST TO SERVE A&P:		.070177		.068835
AVERAGE LIST PRICE PER POINT:	.267400	.266200	.266200	.266200
AVERAGE DISCOUNT PER POINT:	36.57%	22.60%	32.56%	22.60%
VALUE OF DISCOUNT PER POINT:	.097788	.060161	.086675	.060161
DISCOUNT PER POINT LESS THAN A&P:		.037627		.026514
NET DIFFERENCE IN PRICE LESS NET DIFFERENCE IN MARKETING COST:		- .032550		- .042321
NET DISCRIMINATION IN FAVOR OF:		- .032550		- .042321

A+P Proposed Findings of Fact - 802 - 000728

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(1) A&P was compared to EACH of the 'complaint' customers, under two methods. Customer used for illustrative purposes in this display - BARNEY TRAINOR

OVERVIEW OF DISCRIMINATION/JUSTIFICATION ANALYSIS, A&P VS. ALLEGEDLY DISCRIMINATED CUSTOMERS, O'HARE BRANCH, MARCH 1966. (1)

MARKETING COST ELEMENTS	BASED ON A&P PURCHASES OF P.L. ITEMS ONLY A&P	BASED ON A&P PURCHASES OF P.L. ITEMS ONLY BILL'S MARKET #002	BASED ON A&P PURCHASES OF TOTAL PVT. L. AND BORD. LABEL A&P	BASED ON A&P PURCHASES OF TOTAL PVT. L. AND BORD. LABEL BILL'S MARKET #002
TRUCK LOADING:	.004916	.005595	.005210	.005595
PHYSICAL DELIVERY:	.022429	.060213	.022429	.060213
BRANCH CLERICAL COST:	.001062	.005865	.001643	.005865
PRODUCT WASTE:	.000000	.001044	.000000	.001044
BRANCH SELLING EXPENSE:	.000000	.016036	.000000	.016036
BORDEN LABEL ADVERTISING EXPENSE:	.000000	.000666	.000400	.000666
BORDEN LABEL MERCHANDISING EXPENSE:	.000000	.008630	.000000	.008630
SUB TOTAL:	.028407	.098049	.029682	.098049
GENERAL SELLING AND ADMINISTRATIVE EXPENSE AT 5.21%	.001480	.005108	.001546	.005108
TOTAL MARKETING COST:	.029887	.103158	.031229	.103158
MARKETING COST PER POINT IN EXCESS OF COST TO SERVE A&P:		.073270		.071929
AVERAGE LIST PRICE PER POINT:	.267400	.267400	.266200	.267400
AVERAGE DISCOUNT PER POINT:	36.57%	25.00%	32.56%	25.00%
VALUE OF DISCOUNT PER POINT:	.097788	.066850	.086675	.066850
DISCOUNT PER POINT LESS THAN A&P:		.030938		.019825
NET DIFFERENCE IN PRICE LESS NET DIFFERENCE IN MARKETING COST:		- .042332		- .052104
NET DISCRIMINATION IN FAVOR OF:		- .042332		- .052104

(1) A&P was compared to EACH of the 'complaint' customers, under two methods. Customer used for illustrative purposes in this display - BILL'S MARKET #002

A+P Proposed Findings of Fact -803- 000729

OVERVIEW OF DISCRIMINATION/JUSTIFICATION ANALYSIS, A&P VS. ALLEGEDLY DISCRIMINATED CUSTOMERS, O'HARE BRANCH, MARCH 1966. (1)

MARKETING COST ELEMENTS	BASED ON A&P PURCHASES OF P.L. ITEMS ONLY A&P	 PETERSON'S FOODS	BASED ON A&P PURCHASES OF TOTAL PVT. L. AND BORD. LABEL A&P	 PETERSON'S FOODS
TRUCK LOADING:	.004916	.004658	.005210	.004658
PHYSICAL DELIVERY:	.022429	.061900	.022429	.061900
BRANCH CLERICAL COST:	.001062	.006266	.001643	.006266
PRODUCT WASTE:	.000000	.001044	.000000	.001044
BRANCH SELLING EXPENSE:	.000000	.016036	.000000	.016036
BORDEN LABEL ADVERTISING EXPENSE:	.000000	.000666	.000400	.000666
BORDEN LABEL MERCHANDISING EXPENSE:	.000000	.008630	.000000	.008630
SUB TOTAL:	.028407	.099400	.029682	.099400
GENERAL SELLING AND ADMINISTRATIVE EXPENSE AT 5.21%	.001460	.005179	.001546	.005179
TOTAL MARKETING COST:	.029837	.104578	.031229	.104578
MARKETING COST PER POINT IN EXCESS OF COST TO SERVE A&P:		.074691		.073350
AVERAGE LIST PRICE PER POINT:	.267400	.285000	.266200	.285000
AVERAGE DISCOUNT PER POINT:	36.57%	13.00%	32.56%	13.00%
VALUE OF DISCOUNT PER POINT:	.097788	.037050	.086675	.037050
DISCOUNT PER POINT LESS THAN A&P:		.060738		.049625
NET DIFFERENCE IN PRICE LESS NET DIFFERENCE IN MARKETING COST:		- .013953		- .023725
NET DISCRIMINATION IN FAVOR OF:		- .013953		- .023725

A+P Proposed Findings of Fact -804- 000730

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(1) A&P was compared to EACH of the 'complaint' customers, under two methods. Customer used for illustrative purposes in this display - PETERSON'S FOODS

OVERVIEW OF DISCRIMINATION/JUSTIFICATION ANALYSIS, A&P VS. ALLEGEDLY DISCRIMINATED CUSTOMERS, O'HARE BRANCH, MARCH 1966. (1)

MARKETING COST ELEMENTS	BASED ON A&P PURCHASES OF P.L. ITEMS ONLY		BASED ON A&P PURCHASES OF TOTAL PVT. L. AND BORD. LABEL	
	A&P	JOE MILECKI	A&P	JOE MILECKI
TRUCK LOADING:	.004916	.006301	.005210	.006301
PHYSICAL DELIVERY:	.022429	.061458	.022429	.061458
BRANCH CLERICAL COST:	.001062	.006222	.001643	.006222
PRODUCT WASTE:	.000000	.001044	.000000	.001044
BRANCH SELLING EXPENSE:	.000000	.016036	.000000	.016036
BORDEN LABEL ADVERTISING EXPENSE:	.000000	.000666	.000400	.000666
BORDEN LABEL MERCHANDISING EXPENSE:	.000000	.008630	.000000	.008630
SUB TOTAL:	.028407	.100356	.029682	.100356
GENERAL SELLING AND ADMINISTRATIVE EXPENSE AT 5.21%	.001480	.005229	.001546	.005229
TOTAL MARKETING COST:	.029887	.105585	.031229	.105585
MARKETING COST PER POINT IN EXCESS OF COST TO SERVE A&P:		.075698		.074356
AVERAGE LIST PRICE PER POINT:	.267400	.257300	.266200	.257300
AVERAGE DISCOUNT PER POINT:	36.57%	20.00%	32.56%	20.00%
VALUE OF DISCOUNT PER POINT:	.097788	.051460	.086675	.051460
DISCOUNT PER POINT LESS THAN A&P:		.046328		.035215
NET DIFFERENCE IN PRICE LESS NET DIFFERENCE IN MARKETING COST:		- .029370		- .039141
NET DISCRIMINATION IN FAVOR OF:		- .029370		- .039141

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(1) A&P was compared to EACH of the 'complaint' customers, under two methods. Customer used for illustrative purposes in this display - JOE MILECKI

786. The end result of the above 28 price-cost comparisons is the calculation of the net difference in price less the net difference in marketing costs. In all cases, the end result shows that the prices A&P received from Borden were cost justified. Indeed, the studies show that there was a net discrimination in favor of the allegedly injured customers in every case. Where A&P's total purchases of milk and dairy products from Borden are compared with the other customers' total purchases, the net discrimination against A&P ranges from a low of $.010648 in the comparison with Bruno Nalepa to a high of $.052104 in the comparison with Bill's Market # 002. Even when the comparison is made of A&P's private label purchases only against the total purchases of the 28 other Borden customers, the price paid by A&P is seen to be cost justified in every instance except the comparison with Edward Marszaick, who was overcharged by Borden only one mill per point. Even here, however, if Marszaick had actually received the discount to which he would have been entitled on the basis of his volume per delivery (184.207 (A&P Finding 653)), he would have received a discount of 15% (see CX 138), rather than the 14.4% discount shown on CX 183, and there would have also been a net discrimination of $.000477 per point in Marszaick's favor. The net discrimination enjoyed by each of the 28 allegedly injured Borden customers, for both types of comparisons, are summaried in the following two tables.

SUMMARY OF DIFFERENCES IN MARKETING COST
AND DIFFERENCE IN PRICES
BORDEN O'HARE BRANCH MARCH 1966
A & P TOTAL VS CUSTOMER BORDEN LABEL

ALLEGEDLY INJURED CUSTOMER	NET DISCRIMINATION IN FAVOR OF A & P	 CUSTOMER
MR. CENTRAL		- .014735
MAYFAIR FOODS		- .027162
JAMES COX		- .013196
MISICKA'S FOODS		- .015419
JOS. MICHALOWSKI		- .010848
CARDINAL STORES		- .016855
MADISON LAVEIGNE		- .019145
BEL PARK FOODS		- .029484
GREENVIEW FRUIT		- .024267
STRICKLAND'S #159		- .033240
ROBERT BATTALI		- .017389
EDWARD MARSZAICK		- .008665 (1)
BILL'S MARKET #194		- .039020
GENE'S FOOD SHOP		- .039398
SPOT LITE MARKET		- .021415
THERESA CRISPINO		- .026917
FOREST FOOD MART		- .024471
STRICKLAND'S #256		- .053310
CONGRESS FOOD		- .030938
FLOOM BROS.		- .023349
JOS. BERLIN & SON		- .021421
BRUNO NALEPA		- .010648 (2)
BLANCHE'S FOODS		- .015820
EDWARD TRUTY		- .016886
BARNEY TRAINOR		- .042322
BILL'S MARKET #002		- .052104
PETERSON'S FOODS		- .023725
JOE MILECKI		- .039142

(1) If Edward Marszaick actually received the discount of 15.0% to which he should have been entitled on the basis of his volume per delivery under Borden's published discount schedule, CX138, rather than the 14.4% rebate shown on CX183, there was actually net discrimination in favor of Edward Marszaick of - .010249 per point on A&P's total purchases.

(2) If Bruno Nalepa actually received the discount of 15.0% to which he should have been entitled on the basis of his volume per delivery under Borden's published discount schedule, CX138, rather than the 13.0% rebate shown on CX 183, there was actually net discrimination in favor of Bruno Nalepa of - .015612 per point on A&P's total purchases.

SUMMARY OF DIFFERENCES IN MARKETING COST
AND DIFFERENCE IN PRICES
BORDEN O'HARE BRANCH MARCH 1966
A & P PRIVATE LABEL VS CUSTOMER BORDEN LABEL

ALLEGEDLY INJURED CUSTOMER	NET DISCRIMINATION IN FAVOR OF A & P	 CUSTOMER
MR. CENTRAL		- .004963
MAYFAIR FOODS		- .017390
JAMES COX		- .003424
MISICKA'S FOODS		- .005647
JOS. MICHALOWSKI		- .001077
CARDINAL STORES		- .007083
MADISON LAVEIGNE		- .009373
BEL PARK FOODS		- .019712
GREENVIEW FRUIT		- .014495
STRICKLAND'S #159		- .023468
ROBERT BATTALI		- .007617
EDWARD MARSZAICK	.001107(1)	
BILL'S MARKET #194		- .029248
GENE'S FOOD SHOP		- .029626
SPOT LITE MARKET		- .011643
THERESA CRISPINO		- .017145
FOREST FOOD MART		- .014699
STRICKLAND'S #256		- .043538
CONGRESS FOOD		- .021166
FLOOM BROS.		- .013577
JOS. BERLIN & SON		- .011649
BRUNO NALEPA		- .000877(2)
BLANCHE'S FOODS		- .006049
EDWARD TRUTY		- .007114
BARNEY TRAINOR		- .032550
BILL'S MARKET #002		- .042332
PETERSON'S FOODS		- .013953
JOE MILECKI		- .029370

(1) If Edward Marszaick actually received the discount of 15.0% to which he should have been entitled on the basis of his volume per delivery under Borden's published discount schedule, CX138, rather than the 14.4% rebate shown in CX183, there was actually net discrimination in favor of Edward Marszaick of -.000477 per point on A&P's private label purchases.

(2) If Bruno Nalepa actually received the discount of 15.0% to which he should have been entitled on the basis of his volume per delivery under Borden's published discount schedule, CX138, rather than the 13.0% rebate shown on CX183, there was actually net discrimination in favor of Bruno Nalepa of -.005849 per point on A&P's private label purchases.

787. Set out in tabular form below is a calculation of the differences in the net price charged A&P and each of the allegedly injured customers (shown in the first column). In the second column of each table is shown the differences in marketing costs exclusive of delivery and overhead incurred by Borden in serving A&P and each of the allegedly injured customers. The first table is for the comparison of A&P's private label purchases only while the second is of its total purchases. The figures below are obtained by simple addition of the cost differences displayed on RA&PX 233, pp. 39-66 for each marketing cost element except physical delivery and general selling and administrative expense.

DIFFERENCE IN AVERAGE NET PRICE PER POINT PAID BY COMPLAINT CUSTOMERS AND A&
LESS ADDITIONAL COST PER POINT INCURRED BY BORDEN FOR MARKETING EXPENSES EXCLUSIVE OF PHYSICAL DELIVERY AND GENERAL SELLING & ADMINISTRATIVE EXPENSES
CUSTOMER BORDEN LABEL POINTS VS A&P PRIVATE LABEL POINTS
O'HARE BRANCH - MARCH, 1966

	A	B	DIFFERENCE IN DISCOUNT LESS DIFFERENCE IN MARKETING COST PER POINT BEFORE CONSIDERING DELIVERY OR GS&A EXPENSE	
CUSTOMER	DISCOUNT PER POINT LESS THAN A&P	MARKETING COST PER POINT IN EXCESS OF COST TO SERVE A&P (EXCL. DELIVERY AND GS&A EXP.)	COST JUSTIFIED A - B > 0	NOT COST JUSTIFIED A - B < 0
MR. CENTRAL	.029109	.027147		+.001962
MAYFAIR FOODS	.020148	.027609	-.007461	
JAMES COX	.036319	.027692		+.008627
MISICKA'S FOODS	.042868	.028925		+.013943
JOS. MICHALOWSKI	.045500	.029446		+.016054
CARDINAL STORES	.043881	.028905		+.014976
MADISON LAVEIGNE	.048998	.029345		+.019653
BEL PARK FOODS	.038553	.029472		+.009081
GREENVIEW FRUIT	.043114	.029074		+.014040
STRICKLAND #159	.034423	.029400		+.005023
ROBERT BATTALI	.049299	.030323		+.018976
EDWARD MARSZAICK	.059772	.030115		+.029657
BILL'S MARKET #194	.029788	.029457		+.000331
GENE'S FOOD SHOP	.027237	.029462	-.002225	
SPOT LITE MARKET	.048288	.030662		+.017626
THERESA CRISPINO	.043782	.030261		+.013521
FOREST FOOD MART	.047409	.029787		+.017622
STRICKLAND #256	.024763	.030440	-.005637	
CONGRESS FOOD	.042643	.030556		+.012087
FLOOM BROS.	.051854	.030385		+.021469
JOS. BERLIN & SON	.056896	.030791		+.026105
BRUNO NALEPA	.065522	.030301		+.034221
BLANCHE'S FOODS	.062425	.031768		+.030657
EDWARD TRUTY	.059527	.031460		+.028067
BARNEY TRAINOR	.037627	.031576		+.006051
BILL'S MARKET #002	.030938	.031858	-.000920	
PETERSON'S FOODS	.060738	.031522		+.029216
JOE MILECKI	.046328	.032921		+.013402

DIFFERENCE IN AVERAGE NET PRICE PER POINT PAID BY COMPLAINT CUSTOMERS AND A&P LESS ADDITIONAL COST PER POINT INCURRED BY BORDEN FOR MARKETING EXPENSES EXCLUSIVE OF PHYSICAL DELIVERY AND GENERAL SELLING & ADMINISTRATIVE EXPENSES CUSTOMER BORDEN LABEL POINTS VS A&P TOTAL PRIVATE AND BORDEN LABEL POINTS O'HARE BRANCH - MARCH, 1966

CUSTOMER	A DISCOUNT PER POINT LESS THAN A&P	B MARKETING COST PER POINT IN EXCESS OF COST TO SERVE A&P (EXCL. DELIVERY AND GS&A EXP.)	DIFFERENCE IN DISCOUNT LESS DIFFERENCE IN MARKETING COST PER POINT BEFORE CONSIDERING DELIVERY OR GS&A EXPENSE COST JUSTIFIED A - B > 0	 NOT COST JUSTIFIED A - B < 0
MR. CENTRAL	.017995	.025872	-.007877	
MAYFAIR FOODS	.009035	.026334	-.017299	
JAMES COX	.025206	.026417	-.001211	
MISICKA'S FOODS	.031755	.027650		+.004105
JOS. MICHALOWSKI	.034387	.028171		+.006216
CARDINAL STORES	.032768	.027630		+.005138
MADISON LAVEIGNE	.037885	.028070		+.009815
BEL PARK FOODS	.027439	.028197	-.000758	
GREENVIEW FRUIT	.032031	.027799		+.004232
STRICKLAND #159	.023310	.028125	-.004815	
ROBERT BATTALI	.038186	.029048		+.009138
EDWARD MARSZAICK	.048659	.028840		+.019819
BILL'S MARKET #194	.018675	.028182	-.009507	
GENE'S FOOD SHOP	.016124	.028187	-.012063	
SPOT LITE MARKET	.037175	.029387		+.007788
THERESA CRISPINO	.032668	.028986		+.003682
FOREST FOOD MART	.036296	.028512		+.007784
STRICKLAND #256	.013650	.029125	-.015745	
CONGRESS FOOD	.031530	.029281		+.002249
FLOOM BROS.	.040741	.029110		+.011631
JOS. BERLIN & SON	.045782	.029516		+.016266
BRUNO NALEPA	.054409	.030026		+.024383
BLANCHE'S FOODS	.051312	.030493		+.020819
EDWARD TRUTY	.048414	.030185		+.018229
BARNEY TRAINOR	.026514	.030301	-.003787	
BILL'S MARKET #002	.019825	.030583	-.010758	
PETERSON'S FOODS	.049625	.030247		+.019378
JOE MILECKI	.035215	.031646		+.003569

788. It is clear from a glance at the above tables that Borden's prices to A&P are justified in 10 of the 28 instances in which total purchases of A&P are compared against total purchases of the allegedly injured customers, without any consideration being given to the differences in physical delivery and overhead costs. Indeed, even where cost justification is not made out, the failure to do so is less than one cent per point in all but 7 comparisons. A glance at the tables will indicate, in fact, that Borden's prices to A&P would be cost justified in all but 2 or 3 cases in each type of comparison, even if the physical delivery cost differences calculated in A&P Finding 668 overstated the difference by 100%. In the face of the evidence, therefore, that the time standards employed in these findings were prepared by the Commission's cost expert (not respondent's), for a region immediately adjacent to the one involved in these proceedings, and since the Commission's expert swore that his time standards were applicable to Chicago, it is entirely reasonable to accept the conclusions of cost justification presented in these findings.

798. Complaint Counsel renew their objection that the cost study should have been limited to the 11 private label

items (C.C. Finding 15(j)(i)). Cavelierly overlooking their own price discrimination exhibit, C.C. 183 A-D, Complaint Counsel protest that Mr. Havemeyer has calculated "a separate 'averages list price' for A&P stores and for each independent competitor . . . based on the separate product mixes purchased by each of these customers . . . from which he then determines the amount of discount per point received by each" (C.C. Br. 162). They point out--and correctly--that "the 'product' involved for A&P in the 'private label purchase only' differs from that in 'A&P's total purchases,' and both of these 'products' differ from those involved in the purchases of the various competitors" (C.C. Br. 162). The consequence, as they see it, is that the list prices are different, and thus the discounts computed from those separate list prices are not comparable (C.C. Br. 162). They claim that "the proper method would have been to first eliminate all products but the eleven involved herein and then, compare on the basis of either A&P's purchase mix, or that of the competitors." (C.C. Br. 163). They point out--again correctly--that this is the methodology used by Mr. Havemeyer in the Hammond study.

790. Complaint Counsel stubbornly refuse to acknowledge the obvious - respondent's comparisons are tailored to respond to Complaint Counsel's price discrimination exhibits. The product mix selected by respondent A&P for its Hammond study tracks that selected by Complaint Counsel. The O'Hare comparison in which only A&P's private label purchases are compared with the allegedly injured customers' total purchases was offered for the sole purpose of responding to Complaint Counsel's O'Hare price comparison exhibit, CX 183 A-D.

791. Complaint Counsel now seek to minimize CX 183, claiming that we have "misconstrued CX 183, which does not purport to set out a comparison of prices between A&P and competing purchasers"(C.C. Br. 94). They go on to say:

> "but rather it merely compares discounts being granted to A&P, as compared to those granted to certain competing purchasers on the O'Hare Routes in February and March 1966. Our main evidence of discrimination, where we have made a detailed comparison of products and prices, concerns itself with certain Indiana customers. CX 183, as well as certain list price and published discount evidence in the record, is more general evidence of the existence of a price discrimination in sales to A&P in other areas and at other times. (C.C. Br. 94, n. 50)."

792. We wonder how can CX 183 be "general evidence of the existence of a price discrimination in sales to A&P" when it "does not purport to set out a comparison of prices between A&P and competing purchasers."

793. It is also difficult to follow Complaint Counsel's reasoning that the Hammond comparisons - both theirs and ours - are methodologically sound while our O'Hare comparison of A&P's total purchases of milk and dairy products from Borden with the total purchases by the other customers of their milk and dairy purchases is invalid. As we have urged elsewhere in our findings, the only comparison that has any economic meaning is that between A&P's entire milk and dairy line and that of the allegedly injured customers.

794. Complaint Counsel rehash their objection that Mr. Havemeyer did not give proper recognition to the expenses associated with the services of Mr. Tarr and his assistant and with those of Malone, Gose, Minkler and others in contract negotiations both before and after the inception of the private label program with A&P (C.C. Finding 15(k)(i), (ii)). We have already shown that the costs associated with the time of these men have been properly allocated by Mr. Havemeyer (A&P Findings 738-741).

795. Complaint Counsel also argue that there were additional expenses of production and handling incurred by Borden to serve A&P (C.C. Finding 15(h)(iii)). They acknowledge that A&P's cost expert, Robert Havemeyer, testified that he knew of nothing which would cause such extra costs (Havemeyer Tr. 7525-26). They fail, however, to acknowledge Mr. Havemeyer's expert testimony that the Woodstock plant was a highly automated plant (Havemeyer Tr. 9718), and had more than one automatic line so that it was able to package more than one label of a product at the same time (Havemeyer Tr. 9718). Even if Borden, for some reason, however, had processed the two product lines on the same machine, the only additional cost involved in switching from one brand of product to another would be the cost associated with changing the carton blanks in the sleeve of the packaging machine. This additional cost would be miniscule (Havemeyer Tr. 9719-20). In the face of such concrete testimony, Complaint Counsel lean on the weak reed of Borden's concerns in the early stages of the private label negotiations that it might incur some additional expenses in running two lines (C.C. Finding 15(h)(iii)). Such speculation is of no probative value.

796. Moreover, the procedure for cost justification set out in Special Bulletin No. 83 of the Wisconsin Dept. of Agriculture contemplates a treatment which excludes production costs from the cost analysis (see RA&PX 9), as does Dr. Solverson in his thesis (see RA&PX 11, appendix). Finally, the Bowman cost justification in United States v. Borden Co., 370 U.S. 460 (1962), was,, like the present studies "based on differences in volume and methods of delivery" (at 465). There was no mention made of differences in production costs, and the Supreme Court found no fault with such a procedure (see pp. 465-471).

797. Complaint Counsel urge that the use of average figures for A&P is erroneous (C.C. Finding 15(o)). They argue that this methodology has the effect of blending-over partial cases thereby increasing the number of points per case and consequently the loading and delivery costs. There is, in fact, only very slight differences in truck loading costs (RA&PX 233, pp. 39-66), and cases are not employed in these findings in the determination of delivery costs (A&P Findings 626-82). Thus, "blending-over partial cases" for 4 out of the 86 A&P stores in the O'Hare Branch (RA&PX 233, p. 8, line 1, col. 1) is of no significance.

798. Moreover, Complaint Counsel's further argument that there was no study made to determine whether there were different classes of A&P stores "based on size, type and purchase volume of the store" is without merit. This argument has been disposed of elsewhere in our brief (see pp. 326-332A). It should be noted that in presenting CX 183, in response to which Mr. Havemeyer's study was prepared, Complaint Counsel used average figures. Complaint Counsel did not present any evidence that any individual A&P store was the beneficiary of a price discrimination.

799. Mr. Havemeyer's study of Borden's costs of serving A&P and its other customers on the O'Hare Branch in March, 1966 is fair and reliable. It demonstrates that Borden's prices to A&P were cost-justified.

D. THE LOWER PRICES A&P WAS CHARGED BY BORDEN COMPARED TO BORDEN'S OTHER CUSTOMERS IN INDIANA WERE JUSTIFIED BY THE LOWER COSTS INCURRED BY BORDEN IN SELLING AND DELIVERING ITS MILK AND DAIRY PRODUCTS TO A&P

1. Introduction

800. Mr. Havemeyer undertook an analysis of Borden's costs and discounts in serving A&P and certain allegedly injured Borden customers in the Hammond area of Indiana similar to the study he conducted with respect to the O'Hare Branch (Havemeyer Tr. 8595). RA&PX 182 is a listing of the underlying documents used by Mr. Havemeyer in this Hammond study (Havemeyer Tr. 8595). In his analysis of the Hammond stores, Mr. Havemeyer generally followed the same principles and techniques which he used in his analysis of the O'Hare stores (Havemeyer Tr. 8597).

801. With respect to the analysis of the physical distribution costs, however, although there was no difference in principle between the analyses performed for Hammond and O'Hare, there were differences due to the specifics of the stiuation (Havemeyer Tr. 8597-98). Twelve of the A&P stores in Hammond were served by store routes of the same type as those studied on O'Hare. One A&P store was on a so-called mixed route, which served canteens as well as stores. Finally, one A&P store was in Valparaiso and one of the stores of one of the allegedly injured

customers, Joseph Tittle & Sons, was in that town. These two stores were served by an independent distributor who was not a Borden employee. There were thus three types of routes which had to be separately studied and their unique costs applied to the stores being considered (Havemeyer Tr. 8598).

802. The Hammond analysis is confined to a comparison of A&P private label purchases against the allegedly injured customers' purchases of those same products, because Complaint Counsel based their Indiana price comparison on the private label products for A&P and the equivalent private label products for the allegedly injured customers (Havemeyer Tr. 8599).

803. In the Hammond sutdies, the costs used for A&P were an average based on the cost of service to all 12 A&P stores (Havemeyer Tr. 8599). No average figures were used for the Complaint Customers. Each was analyzed separately (Havemeyer Tr. 8599-8600).

804. The results of Mr. Havemeyer's studies are contained in RA&PX 185-196. The analysis of the twelve A&P stores on the regular routes will be found in RA&PX 185. The analysis of the A&P store on the mixed route will be found in

RA&PX 186, and that for the A&P store in Valparaiso in RA&PX 187. The actual comparisons between Borden's costs and prices to A&P and its costs and prices to each of the allegedly injured Indiana stores are contained in RA&PX 188-196. These volumes contain the comparisons between A&P and Tittle, Valparaiso (RA&PX 188), Tittle, Lake Street (RA&PX 189), Tittle, Highland (RA&PX 190), Tittle, Village Court (RA&PX 191), all four Tittle stores combined (RA&PX 192), Burger's Food Market (RA&PX 193), Model Food Center (RA&PX 194), Wallies Market (RA&PX 195), and Wilco Food Center (RA&PX 196) (Havemeyer Tr. 8600-02). The summary comparison for each of the allegedly injured customers is also contained in RA&PX 185, pp. 3-10 (Havemeyer Tr. 8605-06; see also RA&PX 234, pp. 3-10).

805. RA&PX 234 contains one copy of, or a revision of, each page in RA&PX 185-196 prepared by Case and Company. A summary of the results of the analysis and comparison appears at page 1 of RA&PX 185. A separate summary of the extent of over-justification of the higher price charged Tittle by reason of higher marketing costs to serve Tittle is set out on page 2 for each of the 4 Tittle stores and for the 4 Tittle stores aggregated. The details of the cost elements and prices for A&P and each of the non-A&P customers appear at pages 3 through 10 of

this exhibit. The underlying source documents, which were included in RA&PX 185-196 are not reproduced in RA&PX 234.

806. The Case and Company analysis shows that in each case, Borden's cost of serving A&P was less than its cost of serving the non-A&P customer. In each case, this difference in Borden's cost was greater than the difference between the price charged A&P and the price charged the non-A&P customer, resulting in a net discrimination in favor of the non-A&P customer. As is more fully discussed hereinafter, this conclusion is not changed by the exclusion by the Administrative Law Judge of Mr. Havemeyer's calculation of the differences in physical delivery costs; Borden's prices to A&P are cost justified in Indiana even without consideration of the delivery cost element. (A&P Findings 945-948). Moreover, as is also demonstrated hereinafter, the calculation of physical delivery costs on the basis of other information in the record shows substantial additional justification of Borden's prices to A&P. (A&P Findings 824 to 879.)

807. Although A&P has presented a complete and reliable study of Borden's costs at Hammond, it should be noted that this study is the least necessary of the three studies offered

by respondent for the reason that there was not a scintilla of evidence offered by Complaint Counsel to show that Borden's prices in Hammond were not cost justified. The Hammond "discrimination" exhibits, to which Case and Company's Hammond study is offered in rebuttal, purport to show price discriminations in the periods October 1966-March 1967 and June 1969-March 1970 (CX 187). Complaint Counsel have offered no Borden records for either of those periods which even purport to calculate Borden's costs of serving anybody, let alone its costs of serving A&P. While Complaint Counsel state in the caption to their Finding 19 (C.C. Br. at 174) that Mr. Havemeyer's Hammond analysis is "intended to rebut contemporaneous Borden internal accounting records", the only records they refer to in the finding are CX 87A-B and CX 206. While we have already demonstrated the inadequacy of those documents in support of Complaint Counsel's burden in Volume I of our brief and findings (A&P Findings 223-232, Vol. I, pp. 196-202, supra), they are totally irrelevant to Hammond. CX 206A-D purports only to show Borden's total profit or loss in its Metropolitan Chicago operations and, furthermore, in combination with CX 87A-B, serves only to show that A&P was subsidizing the rest of Borden's Chicago business (A&P Findings 227-231, Vol. I, pp. 198-202, supra). CX 87A-B is not contemporaneous. Both documents are dated May 1966.

Thus, they do not bear on Borden's operations in the periods October 1966-March 1967 and June 1969-March 1970, the only periods for which Complaint Counsel purport to show "discrimination" in the sale of private label milk and dairy products in Hammond.

808. There is no showing that the May 1966 cost information on which Complaint Counsel rely is applicable to Hammond in these later periods and one cannot assume its applicability. If, however, one were to apply the costs estimated by Borden in May 1966 to Borden's situation in 1969, he would find that Borden was earning a substantial profit. Borden's per point estimate of all its costs of delivering private label milk to A&P in May 1966 was $.1643 (CX 87A). If these costs were regarded, however, as being still applicable to its business in 1969, Borden will be seem to be earning a profit that can only be described as enormous for the dairy industry where profits run in the neighborhood of 3-4%. Borden's net price per point of private label merchandise sold to A&P in October 1969 was $.195224 (RA&PX 234, pp. 3-9). Subtracting costs of $.1643 would, therefore, indicate a profit of $.030924, or almost 19%.

809. Nor can one assume that Borden's costs rose in proportion to its prices. No such assumption can be made

for it is as likely that Borden's profits rose, fell or remained stable, and there is nothing in the record to fill this gap (CX 206, the statement of Borden's Chicago profits extends only to the end of August 1966). In fact, we would note that what evidence is available would indicate that Borden's profit position on its private label business increased during this period, at least vis-a-vis that for its other customers. As Complaint Counsel point out (C.C. Br. 303), "the price differences had been greatly reduced for most of the stores in question".

810. Moreover, if Mr. Havemeyer's cost studies are deficient as argued by Complaint Counsel (C.C. Br. 300-302), because based on a single month only, why are Complaint Counsel's so-called Malone studies, CX 23-25A, 54B and 87A-B, not likewise inapplicable to Borden's costs at the time periods encompassed by their "primary periods of proof" (C.C. Br. 301) of price discrimination.

811. We submit that Complaint Counsel's arguments on this issue are applicable to their so-called studies as well but with far more force than to Mr. Havemeyer's studies. It is they who have the initial burden of proof on the question of costs.

812. Finally, we would note that Complaint Counsel have refuted their own argument that the price discrimination worsened as a result of A&P's refusal in May 1966 to accept some of the price increases requested by Borden. As noted above, they themselves have shown that the price between A&P and its competitors decreased.

2. Truckloading Costs - Hammond

813. The truckloading costs per point for each customer were computed by dividing the truckloading cost per case by the average number of points per case for the private label items delivered to that customer (Havemeyer Tr. 8609-10). Prior to the revisions made in RA&PX 234, this came to $.0015 for both A&P and each of the other customers (RA&PX 135, pp. 3-9; Havemeyer Tr. 8610). In the revised studies found in RA&PX 234, the cost per point for the truckloading function has been recomputed and carried to six decimal places. RA&PX 234 shows very slight differences among the customers in the per point cost of truckloading; these differences appear in the

fifth and sixth decimal places.* The cost of truckloading is higher for the non-A&P store in every case except Burger (RA&PX 234, pp. 3-9).

814. The computation of the truckloading cost is shown on RA&PX 185, p. 25 (Havemeyer Tr. 8610; see also RA&PX 234, pp. 78, 78a). The cost per case for truckloading was initially calculated as $.0371 (Havemeyer Tr. 8610; RA&PX 185, p. 125). In the revision in RA&PX 234, where the calculation has been carried to six decimal places, the cost per case is now seen to be $.037026 (RA&PX 234, p. 78). The cost per case was determined by dividing the cost incurred by Borden in the truckloading operation at Hammond in October, 1969 by the number of cases loaded (Havemeyer Tr. 8610-11; RA&PX 185, p. 125; RA&PX 234, pp. 78, 78a).

815. The cost of the truckloading operation in October, 1969 was $906.21 (Havemeyer Tr. 8610-11; RA&PX 185, p. 125; RA&PX 234, pp. 78, 78a). The calculation of this cost is set out in RA&PX 234, pp. 80, 81. The truckloading cost consists of an item of $675.72, which was taken from

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* The calculations in RA&PX 234 are carried to six decimal places, not four as claimed by Complaint Counsel. For example, the truckloading cost for A&P and Burger are, respectively, $.001515 and $.001508, the difference in this instance, appearing in the sixth decimal place.

a Borden accounting record for Hammond for October, 1969 (RA&PX 86) in an entry identified as "Wages-Platform & Load" (Havemeyer Tr. 8611). To the $675.72 is added the fringe benefit costs associated with this labor of 34.11% or $230.49 (Havemeyer Tr. 8612; RA&PX 185, p. 142, line 7; RA&PX 234, p. 81, line 7).

816. The details of the calculation of fringe benefits as a percentage of labor costs is shown on RA&PX 185, p. 141 (Havemeyer Tr. 8612; see also RA&PX 234, p. 80). It is simply the total fringe benefit expenses - union and other benefits, unemployment insurance and FICA, Borden benefit program, workmen's compensation, miscellaneous (sick pay, etc.), and vacations and holidays - divided by the total wages paid by Borden (Havemeyer Tr. 8612-13; RA&PX 185, p. 141; RA&PX 234, p. 80).

817. The calculation of the number of cases loaded on the three store routes is shown on RA&PX 185, p. 24 (Havemeyer Tr. 8613; see also RA&PX 234, p. 19). The number of cases loaded for all of the complaint customers (except Tittle Valparaiso), all 12 A&P stores on the three regular routes and all other customers on the three store routes operated at Hammond in October, 1969 are added together (Havemeyer Tr. 8614). To this is added the total number of cases delivered on the three canteen routes (Havemeyer Tr. 8614), which are calculated on RA&PX 186, pp. 6, 9 and 12 (Havemeyer Tr. 8614-16).

818. The truckloading costs of $906.21 was then divided by the total number of cases - 24,418 before revisions (RA&PX 185, p. 125), 24,475 after revisions (RA&PX 234, p. 78) - to arrive at the cost per case of $.037026 (RA&PX 234, p. 78; Havemeyer Tr. 8616). The cost per case was then divided by the number of points per case to arrive at a cost per point (Havemeyer Tr. 8616). The points per case for all customers was approximately 24 plus, which accounts for the fact that the cost per point of the truckloading function in Hammond is nearly the same for all customers (Havemeyer Tr. 8617).

819. In determining the amount to be identified as truckloading cost, Mr. Havemeyer considered only wages and associated fringe benefit costs. Complaint Counsel protest that certain other costs, i.e., building, land, refrigeration, machinery, repairs or other expenses associated with loading, which were allocated by Mr. Havemeyer to delivery expense, should have been included in the truck loading cost calculation (C.C. Br. 177). Mr. Havemeyer could not take into account the cost of the machinery used in truckloading or other costs conceivably associated with truckloading because the Borden records do not allow an identification of any expenses other than wages to the platform and loading function (Havemeyer Tr. 8618-19). Moreover, it was appropriate to allocate these additional expenses to the delivery account because

most of the activities of the branch were conducted for the purpose of selling and delivery.

820. It should further be recognized that Borden in its accounting system assigned all of the costs which Complaint Counsel contend are omitted, as well as the wage expenses, to its delivery expense account (RA&PX 86). If Mr. Havemeyer had followed the Borden accounting system, the truck loading costs would have been included in his calculation of the per point physical delivery cost. Such allocation would have increased the cost justification presented in his studies (Havemeyer Tr. 8622). To summarize: any shift in identification of truck loading expenses would be of small consequence and would be not only arbitrary but in conflict with Borden's accounting system.

821. Complaint Counsel also argue that there was the possibility of additional expense incurred by Borden to serve A&P as allegedly "extra work in the form of mixing labels and pallets had to be done specially for A&P" (C.C. Br. 178). This argument is without merit and has been disposed of in A&P Finding 521, supra.

3. Truckloading Costs - Valparaiso

822. As is stated in the introduction to this part of our findings (A&P Finding 801), the costs to the A&P store and the Tittle store in Valparaiso required a separate study because they were served by an independent distributor. The truckloading costs for both A&P and Tittle in Valparaiso were determined to be $.0050 (RA&PX 185, p. 10; RA&PX 234, p. 10).

823. The calculation of the truckloading costs for Valparaiso is set out in RA&PX 187, p. 5 (Havemeyer Tr. 8624; see, also, RA&PX 234, p. 87). The only criticism Complaint Counsel make with reference to this calculation is their continued unsubstantiated speculation concerning alleged possible extra costs (C.C. Br. 268).

4. Physical Delivery Costs - Hammond

824. The method used to develop the findings for physical delivery costs for the A&P stores and the allegedly injured customers served through Borden's Hammond Branch generally follows the concept which has previously been described under the section on physical delivery cost for customers served by Borden's O'Hare Branch (Havemeyer Tr. 8597). There were some differences, however, due to the specifics

of the two situations. In the Hammond analysis, Mr. Havemeyer was required to analyze three different types of routes, store routes of the type studied at O'Hare, a mixed route, serving stores and canteens, and a route served by an independent route which delivered to A&P and a Tittle store in Valparaiso (A&P Finding 801).

Description of Method used to Determine the Delivery Costs for the Regular Store Routes that Served 12 of the 14 A&P Stores and all Allegedly Injured Customers except one of four stores owned by Joseph Tittle & Sons

825. Mr. Havemeyer did not present a flow chart depicting the procedure followed in this analysis of customers serviced through Borden Hammond Branch as he did in the case of the O'Hare analysis. However, the same general procedure was followed (Havemeyer Tr. 8597). From an analysis of invoices for two weeks ended 10/18/69, previous testimony, and a stipulation of the parties, Case and Company determined the volume in points delivered to each customer, the number of deliveries made per week to each customer, the type and frequency of collections involved in servicing each customer, and the type of delivery service provided by Borden to each customer (RA&PX 185, p. 11; RA&PX 234, p. 11). With this information in hand, and with a set of delivery time standards, one is able to determine the delivery time per point to serve that customer, expressed in minutes per point (A&P Finding 627).

826. To determine the cost incurred by the Borden Company for deliveries to stores served on wholesale routes operated by the Borden Company, Mr. Havemeyer first determined the cost per route day incurred by Borden to operate such routes. For the three wholesale routes devoted primarily to serving grocery store customers the total cost per route day was $179.69 (RA&PX 234, p. 84).

827. The next step is to determine the cost per serving minute. To do so the cost per route day of $179.69 (RA&PX 234, p. 84) is merely divided by 480 minutes - i.e., 8 hours per day x 60 minutes (RA&PX 9, p. 6). The normal work day is 8 hours,* and the available records indicate that those were, in fact, the hours worked by the Borden drivers (Havemeyer Tr. 8732-33; RA&PX 92). It can be readily seen, therefore, that the cost per route minute was $.37435 ($179.69 ÷ 480).

828. The number of points delivered to each customer served on the three wholesale routes devoted to store customers delivered during the two weeks ending October 18, 1969, was determined for each of the customers served on these routes. The results of this analysis, for the 12 A&P

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* Borden's union contract, CX-119 specified a normal eight hour work day and forty hour normal work week.

stores served by these three routes, are shown on RA&PX 234, pages 20 through 32. The volume for the allegedly injured customers served on the store routes during this period is shown in RA&PX 234, pages 50 through 55. The volume delivered to the other grocery store customers is shown in RA&PX 234, pages 56 and 59 through 66 inclusive. The volume delivered to Tiebel's Restaurant, a non-grocery-store customer, is shown on RA&PX 234, p. 58. The Hammond store routes were operated six days per week with 27 delivery days in the month of October 1969. (RA&PX 75, October 1969).

829. The number of deliveries to each customer served on these routes delivered during the month of October is shown on RA&PX 234, p. 11.

830. The number of points per month delivered to each customer served by the three wholesale store routes was determined by dividing the number of points delivered during the two week period by 12 (the number of delivery days during that period) and multiplying the result by 27 (the number of delivery days during the month of October). The number of points per delivery for each customer served was determined by dividing the total points per month by the number of deliveries received by each customer in the month. The results of these calculations are as follows:

SUMMARY OF VOLUME AND SERVICE DELIVERED ON BORDEN STORE ROUTES BY CLASS OF CUSTOMER
HAMMOND BRANCH - OCTOBER 1969

GROCERY STORE CUSTOMERS	RA&PX 234 PAGE #	A ALL POINTS DELIVERED 2 WKS END 10/18/69	B TOTAL POINTS PER MONTH (AX27/12)	C DELIVERIES PER MONTH RA&PX 234 PAGE 11	D POINTS PER DELIVERY (B / C)
A & P # 264	21	15847.50	35656.87	27	1320.62
A & P # 310	22	6154.00	13846.50	27	512.83
A & P # 318	23	5340.00	12015.00	27	445.00
A & P # 317	24	11426.00	25708.50	27	952.17
A & P # 306	25	7039.00	15837.75	27	586.58
A & P # 323	26	5230.00	11767.50	27	435.83
A & P # 377	27	10579.00	23802.75	27	881.58
A & P # 305	28	5994.00	13486.50	27	499.50
A & P # 354	29	12716.00	28611.00	27	1059.67
A & P # 273	30	7705.00	17336.25	27	642.08
A & P # 311	31	12036.00	27081.00	27	1003.00
A & P # 275	32	6424.00	14454.00	27	535.33
SUB TOTAL A&P		106490.50	239603.62	324	
TITTLE HIGHLAND HAMMOND	50	6125.00	13781.25	27	510.42
TITTLE LAKE ST. HAMMOND	51	8070.00	18157.50	27	672.50
TITTLE VILLAGE CT. GARY	52	11036.00	24831.00	27	919.67
BURGER'S FOOD MARKET HAMMOND	53	23781.00	53507.25	27	1981.75
[illegible] FOOD CENTER HAMMOND	54	5443.00	12246.75	27	453.58
WILCO FOOD CENTER GARY	55	20383.00	45861.75	27	1698.58
WALLIES MARKET HAMMOND	56	5522.00	12424.50	27	460.17
K-MART	57	4030.00	9067.50	23	394.24
DE LOCKS 6829	59	2552.00	5742.00	27	212.67
DE LOCKS 1201	60	3384.00	7614.00	27	282.00
DE LOCKS 2620	61	4666.00	10498.50	27	388.83
SOUTH SIDE BANTAM	62	4860.00	10935.00	27	405.00
STOP & SHOP	63	2995.50	6739.87	27	249.62
STAN'S GROCERY	64	1236.00	2781.00	14	198.64
[illegible]	65	4251.50	9565.87	27	354.29
JIM'S MARATHON	66	392.00	882.00	14	63.00
TIEBEL'S RESTAURANT	58	1832.00	4122.00	27	152.67

A&P Proposed Findings of Fact

-835- 000761

831. The Administrative Law Judge has held that the time standards developed and used by Case and Company are inadmissible in these proceedings. Nevertheless, the record (RA&PX 9 and RA&PX 8) includes grocery store serving time standards for full service and "modified drop service" deliveries to grocery stores with delivery volumes per delivery up to 900 - 1,000 units per delivery and "drop service" delivery to grocery stores with delivery volumes up to 1,900 to 2,000 units per delivery. The record also includes (RA&PX 11, p. 206) serving time standards for "full service" delivery to restaurants. These serving time standards are based on units having a value equal to one quart of fluid milk, and these are essentially similar to the point values determined as a measurement of relative volume by the customers in Mr. Havemeyer's analysis.* The relevant information is reproduced here for the Court's convenience,

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* For the three major items, homogenized milk in paper gallons, half gallons and quarts, and for all the other items in these size containers, the point values and equivalent quart units are identical (Compare RA& PX 66, p. 7 with RA&PX 9, p. 3).

TABLE 1.—FULL SERVICE—SERVICE TIME PER DELIVERY

Number of units	Service time in minutes	Number of units	Service time in minutes
0	1.65	21- 25	9.45
1	3.00	26- 30	10.45
2	3.50	31- 35	11.15
3	4.00	36- 40	12.00
4	4.50	41- 45	12.85
5	5.00	46- 50	13.65
6	5.50	51- 60	14.75
7	5.75	61- 70	16.20
8	6.00	71- 80	17.65
9	6.50	81- 90	19.10
10	6.75	91-100	20.60
11	7.00	101-110	21.85
12	7.25	111-120	23.13
13	7.50	121-130	24.38
14	7.75	131-140	25.60
15	8.00	141-150	26.63
16	8.25	151-160	27.75
17	8.50	161-170	28.88
18	8.75	171-180	29.80
19	9.00	181-190	30.60
20	9.25	191-200	31.40

Source: Time studies conducted by the Wisconsin State Department of Agriculture, Department of Agricultural Economics, University of Wisconsin, and cooperating dairies during 1963. This time data is only for retail food stores.

TABLE 2.—MODIFIED DROP SERVICE—SERVICE TIME PER DELIVERY

Number of units	Service time in minutes	Number of units	Service time in minutes
1- 10	2.50	151- 200	19.90
11- 20	3.50	201- 250	24.00
21- 30	4.75	251- 300	26.00
31- 40	6.00	301- 350	28.50
41- 50	8.00	351- 400	30.50
51- 60	9.00	401- 500	35.25
61- 70	10.25	501- 600	40.50
71- 80	11.50	601- 700	44.75
81- 90	12.30	701- 800	48.50
91-100	13.00	801- 900	51.50
101-150	15.90	901-1000	53.50

Source: Time studies conducted by the Wisconsin State Department of Agriculture, Department of Agricultural Economics, University of Wisconsin, and cooperating dairies during 1963. This time data is only for retail food stores.

TABLE 3.—DROP SERVICE—SERVICE TIME PER STOP

Number of units	Service time in minutes	Number of units	Service time in minutes
50-100	5.500	801- 850	26.750
101-150	8.000	851- 900	27.750
151-200	10.250	901- 950	28.500
201-250	12.250	951-1000	29.250
251-300	14.000	1001-1100	30.500
301-350	15.500	1101-1200	32.000
351-400	17.000	1201-1300	33.750
401-450	18.250	1301-1400	35.225
451-500	19.500	1401-1500	36.500
501-550	20.750	1501-1600	37.750
551-600	22.000	1601-1700	38.500
601-650	23.000	1701-1800	39.500
651-700	24.000	1801-1900	40.000
701-750	25.250	1901-2000	40.500
751-800	26.000		

Source: Time studies conducted by the Wisconsin State Department of Agriculture, Department of Agricultural Economics, University of Wisconsin, and cooperating dairies during 1963. This time data is only for retail food stores.

Time Requirements for Full Service and Modified Drop Service - Grocery Store Wholesale Milk Delivery

No. of Units	No. of Minutes Per Delivery (Full Service) 1/	No. of Minutes Per Unit (Full Service) 2/	No. of Minutes Per Delivery (Modified Drop Service) 3/	No. of Minutes Per Unit (Modified Drop Service) 2/
201-250	35.25	.157	24.00	.107
251-300	37.95	.138	26.00	.095
301-350	41.32	.127	28.50	.088
351-400	44.02	.117	30.50	.081
401-500	50.44	.112	35.25	.078
501-600	57.52	.105	40.50	.074
601-700	63.26	.097	44.75	.069
701-800	68.32	.091	48.50	.065
801-900	72.38	.085	51.50	.061
901-1000	75.08	.079	53.50	.056

1/ Source (brackets 1-10 through 151-200): Average time data collected from Wisconsin Dairies. Source (brackets 201-250 through 901-1000): Estimated by using Modified Drop Service Time as a predictor. The formula used was: Full Service Time per delivery in minutes = 2.85 + 1.35 times Modified Drop Time (see graph 1).

2/ No. of Minutes Per Unit = No. of Minutes Per Delivery divided by the midpoint of the bracket.

3/ Source: Average time data collected from Wisconsin Dairies.

APPENDIX TABLE 4.--Wholesale Fluid Milk Delivery, Restaurant Full Service--Service Time Per Delivery*

Number of Units	Service Time in Minutes
1- 5	6.37
6- 10	7.79
11- 15	8.50
16- 20	9.32
21- 30	10.47
31- 40	11.51
41- 50	13.00
51- 60	14.00
61- 70	15.00
71- 80	16.00
81- 90	17.00
91-100	18.00
101-125	19.50
126-150	21.50
151-175	23.25
176-200	25.00
201-250	27.50
251-300	30.00
301-350	32.00
351-400	34.00
401-450	36.00
451-500	37.50

Source: Time Studies Conducted by the Wisconsin State Department of Agriculture and the Department of Agricultural Economics, The University of Wisconsin, from 1963 to 1965.

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* Dr. Solverson's thesis provides only this single table for restaurants. No break-down between full service, drop service and modified drop service is set out for restaurants.

832. Three of the A&P stores had volumes per delivery in excess of 1,000 units, and two of the allegedly injured customers had volumes per delivery in excess of 1,000 units. While those volume brackets are beyond those set out in the tables reproduced above, serving times for these brackets can be easily extrapolated from the tables.

833. Footnote 1 of RA&PX 8 indicates that Complaint Counsel's expert, Dr. Solverson, developed an equation to determine the delivery standards for full service beyond a delivery volume of 200 units, which is the limit of the full service time standards table (Table 1 of RA&PX 9). Dr. Solverson's equation states that full service time per delivery in minutes = 2.85 + 1.35 times modified drop time (RA&PX 8, n.1). It will be noted that the equation uses modified drop service time as a basis for projection of full service time.

834. The same exhibits, and the same approach, can also be used to determine modified drop service time per delivery beyond 1,000 units, which is the limit of the modified drop service time standards table (Table 2 of RA&PX 9). In this case, standards for modified drop service are developed using the drop service time in Table 3 of RA&PX 9 as the basis for the projection.

835. Listed below are the drop service and modified drop service time standards from Tables 2 and 3 of RA&PX 9, between volumes of 50 and 1,000 units per delivery.*

UNITS	DROP SERVICE TIME (MIN.)	MODIFIED DROP SERVICE TIME (MIN.)
50-100	5.500	11.21 *
101-150	8.000	15.90
150-200	10.250	19.90
201-250	12.250	24.00
251-300	14.000	26.00
301-350	15.500	28.50
351-400	17.000	30.50
401-500	18.875 *	35.25
501-600	21.375 *	40.50
601-700	23.500 *	44.75
701-800	25.625 *	48.50
801-900	27.250 *	51.50
901-1,00	28.875 *	53.50

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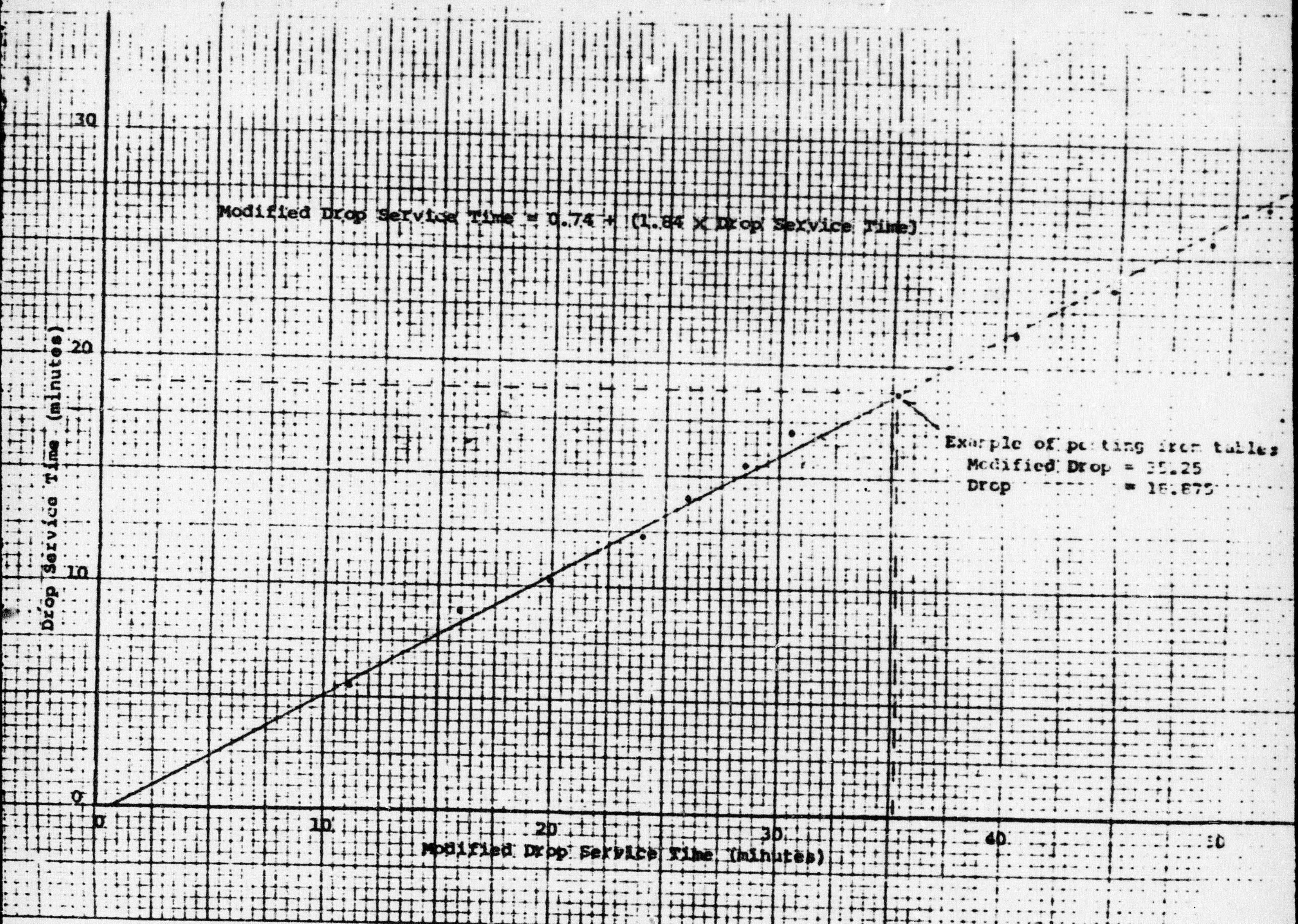
* Inasmuch as the volume brackets do not coincide exactly between the two tables, it was necessary in some instances to combine values of two brackets, by averaging, to compare the two sets of standards. For example, the value of drop service time for delivery volumes of 401-500 units is determined by averaging the drop service times in Table 3 of RA&PX 9 for bracket 401-450 and 451-500 as follows:

401 - 450 units, time is 18.250 minutes
451 - 500 units, time is 19.500 minutes
37.750
37.750 ÷ 2 = 18.875

The brackets in which such averaging was used are indicated by an asterisk (*).

836. Dr. Solverson developed his equation by use of a graph which displayed the linear relationship between the time standards for the two types of service (RA&PX 8 n.1). Accordingly, the data in the above table is likewise displayed on the following graph in which the modified drop service time is plotted on the horizontal axis and the corresponding drop service time is plotted on the vertical axis. The points on the graph through which the straight line is drawn are the points corresponding to the times set forth in the table set out in A&P Finding 835. For example, the drop service time required to deliver 401-500 units per delivery is 18.875 minutes. The corresponding modified drop service time in that same volume bracket is 35.25 minutes (see dashed lines).



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837. Examination of the above table and chart reveals that modified drop service time equals 0.74 + 1.84 times drop service time, that is, modified drop time can be obtained for any bracket by multiplying the drop service time in that same bracket by 1.84 and adding 0.74. For example, the time required for drop service in the 401-500 unit per delivery bracket is 18.875 minutes. Multiplying this time by 1.84 gives 34.53 minutes. Adding 0.74 minutes gives 35.27 minutes, which closely corresponds to the actual value of 35.25 minutes set out in the modified drop service time table.

838. By use of the equation reflecting the correspondence of drop service and modified drop service time, we can determine modified drop service time for the following three brackets, which we shall use hereinafter in these findings:

Units	Drop Service (1)	Modified Drop Service (2)
1001 - 1100	30.500 min.	56.86 min.
1301 - 1400	35.225	65.55
1601 - 1700	38.500	71.58

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(1) See Table 3, RA&PX 9 (RA&PX Finding 831).

(2) Determined from equation correlating modified drop service time with drop service time (A&P Finding 837).

839. Burger's Food Market had a volume of 1981.75 points per delivery, but received full service (RA&PX 234, p. 11). We can apply Dr. Solverson's equation and the equation developed above to calculate the time for full service delivery from the time set out in Table 3 for drop service delivery. The drop service time for 1901-2000 units is 40.50 minutes. The modified drop time is, accordingly, 74.52 minutes (40.50 x 1.84 + 0.74). The full service time, therefore, is 104.45 minutes (74.52 x 1.35 + 2.85) (RA&PX 8).

840. The use of the time standards set out above makes it possible to calculate the cost per point of delivery to each customer, when the cost per route minute is known, by calculating the specific cost of each delivery, the common cost of each delivery, and dividing the sum of the specific cost and common cost by the number of points per delivery, as described in RA&PX 9.

841. Examination of the definitions of the methods of delivery set out in RA&PX 9, pp. 2, 3 and analysis of the delivery provisions of the Private Label agreement (CX 62) and the subsequent Borden label pricing agreement (RA&PX 66) show that the A&P stores received a service no more time consuming than modified drop service. Indeed, it is likely that A&P received an even less costly service, drop service (A&P Findings 557-562), but the analysis in these findings is based on the assumption that the A&P service was Modified Drop Service. Complaint

Counsel's witness, Dr. Lyle Solverson, testified that he would classify Borden's delivery service to A&P as "Modified Drop Service" (Tr. 1557-58). This type of service was designated "Limited Service" in RA&PX 185, p. 11 and RA&PX 234, p. 11.

842. The testimony of the operator of the Wilco Food Center, Gary Indiana (Gintert Tr. 2520.24), and the description of services received by K-Mart in the stipulation between the parties (RA&PX 36), shows that these customers, like A&P, pre-ordered their merchandise, did not take the privilege of returning out-of-date merchandise for credit, and had the merchandise delivered only to the reserve cooler or backroom of the store. Accordingly, the appropriate serving time standards for these customers would also be those developed for "Modified Drop Service." This service was designated "Limited Service" in RA&PX 185, p. 11 and RA&PX 234, p. 11.

843. The testimony of the operators of the other allegedly injured customers, analysis of the stipulation (RA&PX 36) describing the services received by the other customers served on Borden's Hammond wholesale routes serving grocery stores, and examination of the route book pages for Jim's

Marathon, shows that all of these customers received full service (RA&PX 239, p. 11). None of these customers had pre-ordered their merchandise and they all received additional services not available under a limited service delivery program (A&P Findings 844-850, infra). Without these limitations, which are explicitly included in the definitions of "Modified Drop Service" and "Drop Service" in RA&PX 9, p. 3, Borden's method of delivery to these customers must be classified as Full Service and delivery time standards appropriate to Full Service must apply (see A&P Findings 844-852, infra).

844. Complaint Counsel attempt to minimize the distinctions in added costs of services to the allegedly injured customers by recounting the testimony of representatives of those customers to the effect that not each and every customer received or enjoyed all aspects of full-service at every delivery (testimony of Mr.Kristoff, President of Berger's Super Markets; Mr. Minard, General Manager of Tittle Stores; and Mr. Barnes of Wallie's Market (C.C. Finding 20(b)(ii), pp. 180-184). They attempt to brush off the extra services received by those customers as "a few slight deviations from the normal delivery procedure" (C.C. Br. 181). They concede however, as indeed they must, that each of these customers received services not provided under a limited delivery system.

845. For Burger, they acknowledge tha Mr. Kristoff testified that the Borden driver rotated stock in the cooler, checked the dairy case, rotated stock in the dairy case, took back outdated merchandise and made special deliveries (C.C. Br. 182). Complaint Counsel's answer is that the "driver did not rotate the stock in the dairy case on a day to day basis, nor did he ever completely stock the case. . . . Ninety-nine percent of the milk delivered to Burger's was simply wheeled into the cooler" (C.C. Br. 182), and the occurrence of out-of-date merchandise was "infrequent" and special deliveries were "rare". Id. For Tittle, they concede that Mr. Minard testified that the driver placed the milk in the dairy case and rotated the stock, that Tittle received special deliveries and Borden bore the risk of spoilage (C.C. Br. 182, 183). Again they attempt to minimize the services as being provided only "on occasion." For Wallies, they acknowledge that the driver would haul some milk to the dairy case, and rotate the stock, and that Borden assumed the risk of spoilage and provided special deliveries. They again attempt to minimize spoilage and special deliveries, but fail to even offer a weak explanation as to the other services.

846. For Model, they claim that the "driver delivered the milk to a back room holding cooler and did nothing more. The driver did not rotate milk in the display case." (C.C. Br. 183, 184). Complaint Counsel are drawing a very nice, and misleading, distinction in this claim. They are correct, the driver didn't rotate milk in the display case; he did, however, rotate the milk in the cooler (Barney Tr. 3807; Peters Tr. 3847). The representatives of Model also testified that the driver brought the milk up to the dairy case (Peters Tr. 3848). Complaint Counsel do admit that Borden ran the risk of spoilage with Model. (C.C. Br. 183).

847. Complaint Counsel have no trouble with Wilco since it "even satisified Mr. Havemeyer that it received limited service". (C.C. Br. 184).

848. Complaint Counsel have not fairly characterized the testimony of the allegedly injured customers. As noted above (A&P Finding 846), they have egregiously mischaracterized the testimony of Model. They conveniently fail to state that Wilco received special deliveries if Wilco's delivery man made a mistake in ordering. To have admitted as much would have undercut their argument that A&P was inconsistently classified by Mr. Havemeyer as having received limited service because it too may have received

special deliveries on rare occasions (C.C. Br. 184).

849. Complaint Counsel attempt to support their misreading of the testimony of the allegedly injured customers by reliance on the testimony of Mr. Szczepaniak, whom they identify as the "Borden Assistant Route Foreman" (C.C. Br. 184) in an obvious attempt to bolster his credentials. They fail to mention that he, in fact, had no supervisory authority (Szczepaniak Tr. 1280). They also claim, without benefit of record citation (there being none), that the differences in services between A&P and the other customers "were not enough to impress [him] so that he classified these customers differently' (C.C. Br. 184). They overlook the limited knowledge of a man whose duties mainly involved covering routes for other drivers when they were unavailable (Szczepaniak Tr. 1280). He testified that deliveries to the independent stores were to the stores' cooler (Szczepaniak Tr. 1289). This is true in that some delivery was generally to the cooler, but it doesn't tell the whole story. The customers themselves stated they received far more services.

850. Complaint Counsel's reliance on Mr. Szczepaniak's testimony cannot minimize the fact that, in addition to receiving the services detailed above, all of the allegedly

injured customers, except A&P and Wilco, enjoyed the benefit of the Borden driver's making up their order - i.e., they did not pre-order, as Complaint Counsel concede (C.C. Br. 181, 184). This is a necessary requirement for the classification of a delivery service as limited according to the testimony of their own expert witness, Dr. Lyle Solverson, who testified that "for modified drop . . . there was preordering" (Solverson Tr. 1588).

851. Complaint Counsel's allegation that "in the case of A&P stores in the Hammond area, no-one was called to testify as to the exact nature of the service received" (C.C. Br. 184) overlooks important record testimony. Mr. Havemeyer, of course, offered his expert testimony as to the nature of the services provided based on his reading of the testimony of the customers themselves and the stipulation of the parties (Havemeyer Tr. 8658; RA&PX 234, p. 11). In addition, Dr. Solverson offered his expert opinion that "the testimony of Mr. Szczepaniak would indicate that the A&P stores were receiving a modified drop service." (Solverson Tr. 1558).

852. Finally, Complaint Counsel are again ignoring the teaching of the Supreme Court in Borden (Bowman). The Court did not say that the Bowman study was deficient, as Complaint

Counsel seem to suggest, because each sub-element that might possibly be involved in "optional customer service" was not performed for every independent which took any element of "optional customer service." Once a type of service has been identified which is performed for some customers and not others, there are practical limits on the extent to which one can identify and quantify every nuance between the service rendered one customer and that rendered another. Nothing in the Borden opinion suggests that a cost study is defective merely because it does not take account of each such nuance.

853. The total specific serving time per month required to service the three Hammond wholesale store routes may be computed by multiplying the serving time per stop, as required for the type of service received and the quantity delivered, by the number of deliveries to each customer. The results are as follows:

GROCERY STORE CUSTOMERS	A TYPE OF SERVICE (1)	B POINTS PER DELIVERY (2)	C SERVING MINUTES PER DEL. (3)	D DELIVER-IES PER MONTH (4)	E SERVING MINUTES PER MONTH (5)
A&P # 264	Mod. Drop	1320.62	65.55	27	1769.85
A&P # 310	Mod. Drop	512.83	40.50	27	1093.50
A&P # 318	Mod. Drop	445.00	35.25	27	951.75
A&P # 317	Mod. Drop	952.17	53.50	27	1444.50
A&P # 386	Mod. Drop	586.58	40.50	27	1093.50
A&P # 325	Mod. Drop	435.83	35.25	27	951.75
A&P # 377	Mod. Drop	881.58	51.50	27	1390.50
A&P # 306	Mod. Drop	499.50	35.25	27	951.75
A&P # 354	Mod. Drop	1059.67	56.86	27	1535.22
A&P # 273	Mod. Drop	642.08	44.75	27	1208.25
A&P # 311	Mod. Drop	1003.00	56.86	27	1535.22
A&P # 275	Mod. Drop	535.33	40.50	27	1093.50
Tittle Highland Hammond	Full	510.42	57.52	27	1553.04
Tittle Lake St. Hammond	Full	672.50	63.26	27	1708.02
Tittle Village Ct. Gary	Full	919.67	75.08	27	2027.16
Burger's Foodmarket Hammond	Full	1981.75	104.45	27	2820.15
Model Food Center Hammond	Full	453.58	50.44	27	1361.88
Wilco Food Center Gary	Mod. Drop	1698.58	71.58	27	1932.66
Wallies Market Hammond	Full	460.17	50.44	27	1361.88
K - Mart	Mod. Drop	394.24	30.50	23	701.50
De Locks 6829	Full	212.67	35.25	27	951.75
De Locks 1201	Full	282.00	37.95	27	1024.65
De Locks 2820	Full	388.83	44.02	27	1188.54
South Side Bantam	Full	405.00	50.44	27	1361.88
Stop & Shop	Full	249.62	35.25	27	951.75
Stan's Grocery	Full	198.64	31.40	14	439.60
HI Low	Full	354.29	44.02	27	1188.54
Jim's Marathon	Full	63.00	16.20	14	226.80
Sub Total, Grocery Stores				726	35819.09
Non-Store:					
Tiebel's Restaurant (4)	Rest. Full	152.67	23.25	27	627.75
Total Store Rte Customers				753	36446.84

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(1) RA&PX 234, p. 11 Limited Service Classified as "Modified Drop".
(2) A&P Finding 830.
(3) Full Service: 1-200 Points RA&PX 9, p. 9, Table 1; 201-1000 Points RA&PX 8; 1001-2000 Points, A&P Finding 839.
Modified Drop Service: 1-1000 Points RA&PX 9, p. 9, Table 2; 1001-2000 Points, A&P Finding 838.
Non-Store Serving Minutes: RA&PX 11; A&P Finding 831.
(4) A&P Finding 830.
(5) Column C multiplied by Column D.

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854. The total number of deliveries made on the three Hammond store routes in October 1969 was 753 (RA&PX 234, p. 19 RA&PX 185, p. 24).

855. The total route minutes for the three Hammond store routes was 38,880 minutes (3 routes x 27 operating days x 8 hours x 60 minutes; A&P Findings 827, 828).

856. The common cost of operating the three Hammond store routes may be determined by subtracting the specific serving time, 36,446.84 minutes (A&P Finding 853), from the total route time (38,880 minutes, A&P Finding 855) and multiplying the remaining 2,433.16 minutes by the $.37435 cost per route minute (A&P Finding 827) to obtain a total common cost of $910.8534 for October, 1969.

857. The common cost per delivery to customers served on the three Hammond store routes may be calculated by dividing the total common cost of $910.8534 (A&P Finding 856) by the 753 deliveries per month (A&P Finding 854) to obtain a common cost per delivery of $1.20963.

858. When the number of serving minutes per delivery, the cost per minute, the constant cost per stop, and the number of points per delivery are known, the delivery cost per point may be calculated. First, serving minutes per delivery is multiplied by the cost per minute to obtain the specific

cost per delivery. Next the constant cost per delivery is added to the specific cost per delivery to obtain total cost per delivery. Then, the total cost per delivery is divided by the number of points delivered per delivery to obtain the delivery cost per point (RA&PX 9, pp. 6-8). The results of this calculation for the allegedly injured Indiana customers served by Borden's three store routes are as follows:

Customer	A Serving Minutes Per Delivery(1)	B Cost Per Minute(2)	C Specific Cost Per Delivery(3)	D Common Cost Per Delivery(4)	E Total Cost Per Delivery(5)
Burger's Food Market Hammond	104.45	$.37435	$39.10086	$1.20963	$40.31049
Model Food Center Hammond	50.44	.37435	18.88221	1.20963	20.09184
Joseph Tittle & Sons Highland, Hammond	57.52	.37435	21.53261	1.20963	22.74224
Joseph Tittle & Sons Lake Street, Hammond	63.26	.37435	23.68138	1.20963	24.89101
Joseph Tittle & Sons Village Court, Gary	75.08	.37435	28.10620	1.20963	29.31583
Wallies Market Hammond	50.44	.37435	18.88221	1.20963	20.09184
Wilco Food Center, Gary	71.58	.37435	26.79597	1.20963	28.00560

(1) A&P Finding 853
(2) A&P Finding 827
(3) Column A multiplied by Column B
(4) A&P Finding 857
(5) Column C + Column D
(6) A&P Finding 830
(7) Column E divided by Column F

A Serving Minutes Per Delivery(1)	B Cost Per Minute(2)	C Specific Cost Per Delivery(3)	D Common Cost Per Delivery(4)	E Total Cost Per Delivery(5)	F Points Delivered Per Delivery(6)	G Delivery Cost Per Point(7)
104.45	$.37435	$39.10086	$1.20963	$40.31049	1981.75	$.020341
50.44	.37435	18.88221	1.20963	20.09184	453.58	.044296
57.52	.37435	21.53261	1.20963	22.74224	510.42	.044556
63.26	.37435	23.68138	1.20963	24.89101	672.50	.037013
75.08	.37435	28.10620	1.20963	29.31583	919.67	.031876
50.44	.37435	18.88221	1.20963	20.09184	460.17	.043662
71.58	.37435	26.79597	1.20963	28.00560	1698.58	.016488

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859. The cost of delivery to the 12 A&P stores served by the three Borden store wholesale routes in Hammond may be calculated by the same procedure employed to calculate the delivery cost per point for the allegedly injured customers served by the three Hammond store routes, as demonstrated in A&P Finding 858. The result of this calculation for the 12 A&P stores served by the three Hammond store wholesale routes are as follows:

Customer	A Serving Minutes Per Delivery(1)	B Cost Per Minute(2)	C Specific Cost Per Delivery(3)	D Common Cost Per Delivery(4)	E Total Cost Per Delivery(5)
A&P #264	65.55	$.37435	24.53864	1.20963	
A&P #310	40.50	"	15.16118	"	
A&P #318	35.25	"	13.19584	"	
A&P #317	53.50	"	20.02773	"	
A&P #386	40.50	"	15.16118	"	
A&P #325	35.25	"	13.19586	"	
A&P #377	51.50	"	19.27903	"	
A&P #306	35.25	"	13.19584	"	
A&P #354	56.86	"	21.28554	"	
A&P #273	44.75	"	16.75216	"	
A&P #311	56.86	"	21.28554	"	
A&P #375	40.50	"	15.16118	"	
12 Store Total	556.27		208.23972	14.51556	222.75528

(1) A&P Finding 853
(2) A&P Finding 827
(3) Column A multiplied by Column B
(4) A&P Finding 857
(5) Column C. plus Column D
(6) A&P Finding 830
(7) Column E divided by Column F

A Serving inutes Per elivery(1)	B Cost Per Minute(2)	C Specific Cost Per Delivery(3)	D Common Cost Per Delivery(4)	E Total Cost Per Delivery(5)	F Points De- livered Per Delivery(6)	G Delivery Cost Per Point(7)
65.55	$.37435	24.53864	1.20963		1320.62	
40.50	"	15.16118	"		512.83	
35.25	"	13.19584	"		445.00	
53.50	"	20.02773	"		952.17	
40.50	"	15.16118	"		586.58	
35.25	"	13.19586	"		435.83	
51.50	"	19.27903	"		881.58	
35.25	"	13.19584	"		499.50	
56.86	"	21.28554	"		1059.67	
44.75	"	16.75216	"		642.08	
56.86	"	21.28554	"		1003.00	
40.50	"	15.16118	"		535.33	
56.27		208.23972	14.51556	222.75528	8874.19	.025101

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The total cost per operating day incurred by Borden to deliver 8874.19 points per day to the 12 A&P stores served by the three store routes was $222.75528. Borden's delivery cost per point to these 12 A&P stores was therefore $.025101 ($222.75528 ÷ 8874.19).

860. For mixed route No. 2 which served A&P Store No. 358, other grocery stores and various other non-store customers, the Borden Company's cost per route day was $134.09 (RA&PX 234, p. 85).*

861. Since Borden's payroll records for Hammond (RA&PX 91, 92) indicate that Bob Warwick, the driver of mixed route No. 2 was paid on the basis of eight hours per day, the cost per route minute of operating route No. 2 may be determined by dividing the route day cost of $134.09 (A&P Finding 860) by 480 minutes (8 hours x 60 minutes) to obtain a cost of $.27935 per route minute.

862. While no serving time standards appear in the record by which the specific serving time required for the various vending machine and non-store customer locations served by this route can be precisely determined, it is reason-

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* This figure differs from the route # 2 route day cost of $127.95 shown in RA&PX 186, p. 1, because it reflects the re-distribution of the assistant route foreman's time (RA&PX 234, p. 85).

able to conclude that the common time per delivery on the route would be no greater than the common time on the store routes because:

a) Route number 2 operated eight hours per day, the same number of hours as the three store routes (RA&PX 91, 92).

b) The route book indicates sixteen locations (A&P Store #358, DeLocks at 1443 Indianapolis B, and fourteen non-store locations) were served by the route. Over the two week period 11/1-11/14, 1969, eleven locations were served twelve times, three location were served 10 times, one location was served eleven times, and one location was served four times, for a total of 177 deliveries in 12 delivery days. This was an average of 14.75 deliveries per day (177 ÷ 12).

c) The three store routes operated 81 route days (RA&PX 234, p. 84) and made 753 deliveries (A&P Finding 854). This was an average of 9.30 deliveries per day (753 ÷ 81).

d) Since common cost per delivery is determined by dividing the cost of all minutes not required for specific serving time on a route by the number of stops, the total common time per route day on route #2 would have had to be more than 58.6% greater $\left(\frac{14.75 - 9.3}{9.3}\right)$ than the common time per route day on the store routes for the common time per stop on route number 2 to exceed the common time per stop on the store routes.

863. The common time per delivery on the store routes may be determined by dividing the total common time of 2433.16 minutes (A&P Finding 856) by 753 deliveries (A&P Finding 854), to obtain 3.231 common minutes per delivery. (2433.16 ÷ 753).

864. The common cost per stop for Route #2, which served A&P Store #358, could therefore be no greater than $.90258 which is a product of the cost per minute on Route #2 ($.27935, A&P Finding 861) multiplied by the common time per delivery (3.231 minutes, A&P Finding 863).

865. The specific cost of delivery to A&P Store #358 on Route Number 2 may be obtained by multiplying the serving minutes per delivery by the cost per minute incurred by Borden to operate Route #2.

866. Store #358 received 5,662 points during the two week period ending 10/18/69. (RA&PX 234, p. 33; RA&PX 186, p. 3).

867. Store #358 received 12 deliveries in a two week period. (RA&PX 234, p. 83; RA&PX 186, p. 4).

868. The average volume per delivery to store #358 was 471.83 points [5,662 (A&P Finding 866), divided by 12 (A&P Finding 867)].

869. Since A&P store #358 received modified drop service (A&P Finding 841), the serving time per delivery would be 35.25 minutes (RA&PX 9, p. 9, Table 2; A&P Finding 831).

870. The specific cost per delivery to store #358 was thus $9.847088 [$.27935 (A&P Finding 861) multiplied by 35.25 (A&P Finding 869)].

871. The total cost per delivery to Store #358 was thus $10.749668 [$.90258 (A&P Finding 864) plus $9.847088 (A&P Finding 870)].

872. The delivery cost per point to Store #358 was therefore no greater than $.022791 [$10.749668 (A&P Finding 871) divided by 471.83 (A&P Finding 868)].

Delivery Cost Per Point To A&P Stores Served By Borden Company Routes Operated By Borden's Hammond Branch.

873. The average cost per point incurred by Borden to delivery to A&P stores served by Borden Company wholesale routes may be determined by dividing the total cost of delivery per delivery day to A&P stores by the total number of points per delivery day delivered to A&P stores. The average cost per point incurred by Borden for delivery to A&P is the weighted average of the cost per point incurred on the stores served on the three store routes and the cost per point for Store #358 on Route #2 (Havemeyer Tr. 8882).

874. The total delivery cost per delivery day to 13 A&P stores was $233.504948 [$222.75528 for 12 stores on store routes (A&P Finding 859) plus $10.749668 for Store #358 (A&P Finding 871)].

875. The total points delivered to A&P stores per delivery day by Borden's Hammond wholesale routes was 9346.02 points [8874.19 points to 12 stores on the store routes (A&P

Finding 859) plus 471.83 points to Store #358 on route #2 (A&P Finding 868).

876. Borden's delivery cost per point to all thirteen A&P stores served by Borden Company wholesale routes operated by Borden's Hammond Branch in October 1969 was $.024984. (233.504948 ÷ 9346.02 *i.e.*, A&P Finding 874 divided by A&P Finding 875).

5. Physical Delivery Costs - Valparaiso

877. The testimony in the record (Marquardt Tr. 1317) indicates that Borden Company paid a flat commission per point regardless of the volume per delivery on deliveries to both the A&P store and the store owned by Joseph Tittle & Sons in Valparaiso, Indiana. Because of this delivery compensation plan for deliveries to these two stores, there was no difference in the cost of physical delivery among the various Borden customers served by the dairy broker, Hammond.

878. Mr. Havemeyer determined the cost of physical delivery to each customer served by the dairy broker to be $.016752 per point by dividing the total cost of delivery

through the Hammond distributor $8.547 (RA&PX 234, p. 87, line 25) by the total number of points distributed through the dairy broker Hammond (510,211, as shown on RA&PX 81, line 1).

879. Complaint Counsel repeat their protests that Mr. Havemeyer's allocations of commissions, automotive and building expenses were improperly made on a time basis and that he improperly averaged data for A&P stores. Their objections have already been demonstrated to be without merit (see A&P Findings 644 to 648, and 675 to 679). Their objection that he may not consider service differences because of a requirement that the opportunity to accept the same limited services must be also offered to all of Borden's other customers is also without merit (See A&P Findings 955-58, *infra*).

6. Branch Clerical Expense - Hammond

880. The calculation of the branch clerical expense is shown on RA&PX 185, p. 125, where it is identified as Office Expense (Havemeyer Tr. 8765; see also RA&PX 234, p. 78). As in the O'Hare analysis, the branch clerical expense is calculated by first determining a cost per delivery, in this case, $3.377367 (RA&PX 234, p. 78) and then

dividing this figure by the number of points per delivery for each customer. There are three inputs for this function, the office expenditure itself, the number of deliveries and the points per delivery for the customer (Havemeyer Tr. 8765).

881. In determining the branch clerical cost per point, Mr. Havemeyer began with Borden's expenditures in October 1969 for this activity which he obtained from a Borden accounting record, RA&PX 86 (Havemeyer Tr. 8766). He was not able to use the year-to-date figure because there were no records from which he could determine the number of deliveries for the 10 month period. Since, the purpose of his analysis was to determine a cost per delivery, it would have been necessary to have had such figures to divide into the expenditures (Havemeyer Tr. 9013-14).

882. The calculation of the number of deliveries in Hammond for October 1969 is shown on RA&PX 185, p. 125 (Havemeyer Tr. 8767; see RA&PX 234, p. 78). The total number of deliveries was determined to be 942, consisting of 753 to the stores on the three regular store routes, plus 189 on the three canteen and mixed routes (Havemeyer Tr. 8767-70; RA&PX 185, p. 125; RA&PX 234, p. 78).

883. In his initial analysis, Mr. Havemeyer determined the cost of the branch clerical function for each allegedly injured customer on the basis of the customer's entire line, and not on the basis of private label equivalent points alone. In the case of A&P, the cost per delivery ticket was first allocated beween private label and non-private label items on the basis of the number of line items for each category (Havemeyer Tr. 8770-73, 9062). The branch clerical cost per point was recomputed during the hearing for the allegedly injured customes on the same basis as the calculation for A&P, and the results are shown on RA&PX 224 (Havemeyer Tr. 9061-63). The branch clerical costs presented on pages 3 to 10 of the final revision of the Hammond studies, RA&PX 234, were developed by this latter method (RA&PX 234, p. ii).

884. The branch clerical costs for A&P and each of the allegedly injured customers is set out on pages 3 to 10 of RA&PX 234. Like the O'Hare study, the methodology followed by Mr. Havemeyer in his determination of the branch clerical cost vastly overstates the costs to A&P vis-a-vis the other customers, and here, as there, Complaint Counsel's objections to Mr. Havemeyer's allocation is without

merit (see A&P Findings 685-688). The Borden Company made available to all customers a 2% discount for central billing (Gose Tr. 1110; Dischner Tr. 7167), which indicates that it valued the saving at about two thirds of a cent per point in clerical costs*. Mr. Havemeyer's analysis has resulted in crediting A&P with a much lower differential. In fact, in the case of the comparison with Burger, Tittle, Hammond, and Wilco, A&P is actually charged with a higher branch clerical cost per point (RA&PX 234, pp. 3-9).

7. Branch Clerical Expense - Valparaiso

885. The branch clerical cost per point for both the A&P store and the Tittle store in Valparaiso was determined to be $.0045 per point (RA&PX 185, p. 10; RA&PX 234, p. 10). This calculation was not challenged or inquired into by Complaint Counsel. In any event, no further discussion of this figure will be undertaken here since it creates no cost difference.

8. Product Waste Costs - Hammond

886. The product waste cost per point is $.002575 (RA&PX 234, pp. 3-9). The calculation of the expense incurred by

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* The average list price per point on A&P's private label purchases was $.3304. Two percent of this price amounts to $.006608 per point.

Borden for product waste is set out in RA&PX 85 at page 125 (Havemeyer Tr. 8776; see also RA&PX 234, p. 78).

887. The amount expended by Borden on product waste at Hammond in October 1969 was $519.57. This figure was obtained from a Borden accounting record which was placed in evidence as RA&PX 86 and is identified as "Location - Hammond, Month, October, 1969, Account - Del. Milk Wholesale" (Havemeyer Tr. 8776; RA&PX 86). The expenditure for product waste is found on RA&PX 86 in an entry entitled "loss returns and waste" (Havemeyer Tr. 8776; RA&PX 86).

888. The product waste cost per point was determined by dividing the total product waste expenditure by the number of full service points, inasmuch as those points constitute the business with respect to which Borden incurred product waste costs (Havemeyer Tr. 8776-77). The full service points were determined by subtracting from the total wholesale points the points delivered on canteen routes and the limited service points delivered on the three store routes to A&P, allegedly injured customer Wilco and a third grocery store customer, K-Mart (Havemeyer Tr. 8777-79).

889. Complaint Counsel argue that the points delivered to the canteen customers should have been considered full service points and not eliminated from this calculation (C.C. Br. 202). The points delivered at canteen stops were subtracted from the total Hammond wholesale points because there are little, if any, returns for product waste on such canteen routes. This is due to the fact that the route man working in a plant fills the canteens or machines himself. If a product is not selling in a particular machine, the route man simply transfers it to another machine (Havemeyer Tr. 8779). Complaint Counsel's argument (C.C. Br. 202) that this should occur in store routes is merely unsubstantiated speculation.

890. When the total product waste incurred by Borden, $519.67, is divided by 201,814 full service points, one obtains a cost per point of $.002575 (Havemeyer Tr. 8781; RA&PX 234, p. 78).

891. As in the O'Hare analysis, A&P was not assigned any of the cost involved in the product waste function (RA&PX 185, pp. 3-70; RA&PX 234, pp. 3-10). In addition, the allegedly injured customer Wilco, since it too received limited service (Havemeyer Tr. 8780; RA&PX 234, p. 11) was not assigned any product waste cost in Mr. Havemeyer's analysis (RA&PX 185, p. 9; RA&PX 234, p. 9).

892. Complaint Counsel contend that Mr. Havemeyer's analysis of what costs are included in the Borden product waste account is incorrect (C.C. Br. 201) and insist on the need to precisely classify stores in their use of this service (C.C. Br. 201). These contentions are unsound. Complaint Counsel refuse to recognize the fact that Mr. Havemeyer's analysis is as precise as possible so long after the events in question. It is unquestionable that there was a service available to the allegedly injured customers for the return of product waste. The product waste service was not a part of the private label contract and A&P bore the risk of spoilage.

893. A demand for a more precise allocation than is possible from the available records does not refute the fact that A&P received diminished service in this area and thus the cost incurred by Borden in serving A&P was necessarily less. Mr. Havemeyer's allocation only charged those allegedly injured customers who did receive the benefit of a product waste return service with the expense identified on Borden's accounts as attributable to this service. It is a perfectly reasonable procedure in a cost study undertaken by a buyer years after the events to charge each customer receiving the return privilege with the cost of this privilege proportionate to his purchases. Without

more accurate records demonstrating the exact use of the service by individual stores this is the only logical method of allocation.

894. In spite of Complaint Counsel's objections that Borden might have included some expense in the product waste cost for faulty merchandise and their claim that his results are ridiculous (C.C. Br. 203), the fact remains that the amount of product waste calculated by Mr. Havemeyer is less than the discount granted by Borden to those customers willing to forego this privilege. Borden's published discount schedule awards a 1% discount from list to a customer for foregoing the return privilege (CX 123, CX 138). As the average list price per point is on the order of 33 cents (RA&PX 234 , p. 14), this amounts to $.0033 per point, which is higher than the value assigned to product waste by Mr. Havemeyer in the Hammond Study (see, RA&PX 234, pp. 3-8).

9. Product Waste Costs - Valparaiso

895. Mr. Havemeyer did not assign any product waste charge to the Tittle store in Valparaiso (Havemeyer Tr. 8787; RA&PX 185, p. 7; RA&PX 234, p. 10), in spite of the fact that Tittle, as a full service customer, enjoyed the return privilege (Minard Tr. 3208).

10. Branch Selling Expense - Hammond

896. Each of the allegedly injured Indiana customers was assigned a branch selling expense of $.023035 per point (Havemeyer Tr. 8781; RA&PX 185, pp. 3-9; RA&PX 234, p. 8) The calculation of the branch selling expense is set out on RA&PX 125, p. 125. (Havemeyer Tr. 8787; see also RA&PX 234, p. 78).

897. Mr. Havemeyer determined that the total amount of money expended by Borden on branch selling at the Hammond Branch in October 1969 in connection with its regular wholesale business was $5,913.97 (RA&PX 234, pp. 78, 86; RA&PX 185, pp. 125, 165).

898. The branch selling expense was taken by Mr. Havemeyer from a Borden accounting record, received as RA&PX 85 (Havemeyer Tr. 8788). This document is entitled "Location, Hammond - Month, October, 1969, Account, Selling Milk Whlse." An analysis of this Borden record will be found on page 165 of RA&PX 185 (Havemeyer Tr. 8788; see RA&PX 234, p. 86 for final analysis). To the selling expenses obtained from RA&PX 85, Mr. Havemeyer added $1,534.07 in selling expenses recorded by Borden in its delivery expense account for its wholesale milk

operations, RA&PX 86. The amount transferred from the delivery account is identified in the Borden records as reflecting amounts spent on travel expense, membership fees and dues, contributions and donations, complimentary products and miscellaneous expenditures (Havemeyer Tr. 8793-8796; RA&PX 185, 165; RA&PX 234, p. 86). Complaint Counsel protest that transfers amount to a duplication of expense items (C.C. Br. 213) because such entries also appear in Borden's selling expenditures account (C.C. Br. 213-214). Clearly, these expenditures are more properly allocable to the selling function than to the delivery function. It is obvious that payments such as those involved here were not made on behalf of truck drivers as opposed to salesmen. In any event, an expert in cost accounting, Mr. Havemeyer, has testified that, in his professional opinion, such expenses were incurred in connection with the selling activities of Borden. Complaint Counsel had the opportunity during Mr. Lemberg's examination to elicit contradictory testimony from him. Their failure to pursue the matter with Mr. Lemberg is itself evidence that Mr. Havemeyer's opinion was sound.*

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* The significance of Complaint Counsel's failure to offer proof, in lieu of speculation and argument, both on this point and many others is clear. See Mammoth Oil Co. v. United States, 275 U.S. 13, 51 (1927), and Gotham Silk Hosiery Co. v. Artcraft Silk Hosiery Mills, Inc., 147

(footnote cont'd on next page)

899. Complaint Counsel claim that Mr. Havemeyer has not adequately studied the selling expense account (C.C. Br. 215-18). They see discrepancies in several areas. Again we note that although Complaint Counsel called an expert witness in rebuttal to Mr. Havemeyer, and indeed called on him to offer criticism of Mr. Havemeyer's allocation of the selling expense, that witness, William Lemberg, gave no such criticisms as those here advanced by Complaint Counsel. Mr. Havemeyer's treatment of the expenses in Borden's selling account was more than fair to Complaint Counsel's position.

(footnote cont'd from preceding page)

F.2d 209, 214 (3d Cir. 1944), each quoting with approval Lord Mansfield's wise caution in Blatch v. Archer, Cowp. 63, 65, 98 Eng.Rep. 969 (K.B. 1774):

> "'[A]ll evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other side to have contradicted.'"

Wigmore has expressed the same view:

> "'The non-production of evidence that would naturally have been produced by an honest and therefore fearless claimant permits the inference that its tenor is unfavorable to the party's cause. Ever since the case of the Chimney-sweeper's Jewel [Armory v Delamirie, 1 Strange 505, 93 Eng. Rep. 664 (K.B. 1722)], this has been a recognized principle.' 2 WIGMORE EVIDENCE, p. 162 (3d ed. 1940) (emphasis in original)."

900. In an effort to adjust for possibly unrepresentative expenditures in the month of October 1969, Mr. Havemeyer used average year-to-date figures in all but one instance (Havemeyer Tr. 8788-90; RA&PX 185, p. 165; RA&PX 234, p. 86). This use of average figures rather than the figures reported for October 1969 resulted in Mr. Havemeyer's obtaining a substantially lower selling expense. For example, the expenditure for supplies in October 1969 was $900. The year-to-date figure for supplies was $4,129 or an average of $412.90 for the ten-month period. Mr. Havemeyer used the lower yearly average figure in determining the amount of selling expenditures for October 1969. It was appropriate to use an average based on year-to-date figures for items of this kind since expenses incurred in one month for items like supplies may actually be allocable to some other month in which the supplies are consumed. Similarly, with the item "Provision-Bad Loans", which was $5,000 in the month of October 1969, but only $32,500 for the year-to-date, Mr. Havemeyer used the lower average monthly amount of $3,250. The only figure actually reported for the month of October which Mr. Havemeyer used was the figure for wages. In this case, the average monthly wages were $2,301 where the actual expenditures incurred in October 1969 were $2,691 or some $290 higher than the average

figure (RA&PX 185, p. 165; RA&PX 234, p. 86). It was certainly appropriate to use the actual wage expenditure incurred by Borden in the month for which the analysis is being made because this expenditure, in comparison to those for which Mr. Havemeyer used year-to-date average figures, is more likely to be an exact economic allocation as it is a continuing expense incurred by the Borden Hammond branch; the other expenditures, by nature, are sporadic and actual figures in any one month are less apt to be representative of regular business operations.

901. Complaint Counsel's attempt to discredit Mr. Havemeyer's methodology merely because he did not blindly allocate the costs for each separate account in the same manner is without basis. We reiterate that, based upon Mr. Havemeyer's expertise in the area and his familiarity with the manner in which these different expenses are actually incurred, Mr. Havemeyer's allocations are justifiable, as for example in the wage expenditure cost analysis above, and are well-supported by the record. (See, for example, Havemeyer Tr. 8372-73; Havemeyer Tr. 8374; Havemeyer Tr. 8818; Havemeyer Tr. 9013-9014; Havemeyer Tr. 9079-9080.) Additionally, Mr. Havemeyer has in many instances given Complaint Counsel's

position the benefit of the doubt when accurate cost allocations are truly questionable.

902. The total selling expense for the month of October 1969 set out by Borden in its accounting record for the sale of milk at wholesale was $6,037.78, after transfers to and from other accounts. If the $1,534.07 in sales expenses, which were recorded in the delivery expense account, is added to this $6,037.78, the total selling expenses for the month of October 1969 would come to $7,571.85. Such an amount is substantially higher than the $5,913.97 allocated to branch selling by Mr. Havemeyer (A&P Finding 897). Had he, therefore, simply contented himself with using the figure reported by Borden for October 1969, it is obvious that he would have derived a higher branch selling cost per point than the one he determined. Since this function is allocated in its entirety to the allegedly injured customers because A&P received no selling services under the Borden-A&P private agreement (CX 62Q), the adjustments made by Mr. Havemeyer, in spite of Complaint Counsel's objection to them, actually decreased the differential in favor of A&P.

903. The total amount of $5,913.97 expended by Borden for the Hammond Branch selling activities was divided by the volume in points sold to stores to which this selling function related (Havemeyer Tr. 8797). Mr. Havemeyer began with the total store route points and subtracted the points sold to

907. Some question has been raised by Complaint Counsel as to the propriety of charging the amount included in the sub-account "Provision-Bad Loans" in the Borden selling expense ledger, RA&PX 85, to the allegedly injured customers as part of the Borden branch selling activities (Havemeyer Tr. 8790-93). The short answer, of course, is that this is how Borden allocated this expenditure in 1969. The Borden Company undoubtedly felt compelled, because of market conditions, to extend loans to its customers in connection with its sales activities to those customers. All of the allegedly injured customers, except Burger, testified that they were, in fact, the beneficiaries of loans of money, equipment and/or interest subsidies from the Borden Company [Barnes (Wallies) Tr. 3867, 3897, 3919; Barney (Model) Tr. 3695, 3743-44; Gintert (Wilco) Tr. 2515, 2468-69; Minard (Tittle) Tr. 3223, 3226-27]. It is certainly appropriate, therefore, to charge them with the loan losses incurred in connection with selling efforts made to obtain their business. This would be true even if those customers had not themselves secured loans from Borden. Where, as here, these customers have secured such loans, there can be no question of the propriety of charging them with this expenditure.

908. Complaint Counsel also contend that the amount allocated to the allegedly injured customers is too high based upon their comparison of the amounts allocated with certain evidence as to the salesman's actual calls and activities (C.C. Br. 218). This comparison involves a number of defects, assumptions, and fallacies. First, it rests on the accuracy of the recollections of the allegedly injured customer witnesses as to just how much time and effort the Borden sales personnel spent on their accounts five years before their testimony. Second, it assumes that the only time spent by the salesman which was attributable to the particular account was the time actually spent in the store, ignoring the time the salesman must have spent on sales planning, telephone communications, development of promotions, traveling, correspondence, and the like. Next, it assumes that the only expense involved in the selling function was the salesman's time, ignoring such other elements as office support, sales supervision, supplies, travel expense, fringe benefits, complementary products, and the like, all of which were included in selling expense (A&P Findings 898, 900). The sales expense used by Mr. Havemeyer was actually incurred and Mr. Havemeyer has allocated it in accordance with sound

accounting principles to the class of customers responsible for the maintenance of a sales organization at the branch. That procedure has not been shown to be improper.

909. Complaint Counsel's next point is that selling expenses are not incurred on a volume basis (C.C. Br. 220). The fact of the matter is that these branch selling expenses are incurred on the basis of those customers who enjoy the benefits of such sales activities at the branch-level, and allocation of this amount by sales volume was the best method available. Mr. Havemeyer did not have time study information so allocation according to time spent was impossible. Moreover, allocation by volume would tend to approximate a time allocation since common sense tells us that more selling time would be spent on a large account than on a small one.

910. Complaint Counsel's arguments that a portion of branch sales expense should be allocated as "missionary work" (C.C. Br. 205, 206), that salesmen do call on A&P stores (C.C. Br. 208, 209), that the sales expense of Borden's chain store manager should be charged against A&P (C.C. Br. 214, 215), that the selling expense is not properly allocable on a volume basis (C.C. Br. 220, 221), and

that Mr. Havemeyer's allocation of the selling expense at Hammond is contradicted by his study on Borden's profit on the private label bid (C.C. Br. 222) are all without merit. They have been refuted elsewhere in our findings (see A&P Findings 728-731, 735, 738-743 and 746.

11. Branch Selling Expense - Valparaiso

911. The cost to Borden of providing branch selling services to the Joseph Tittle & Sons store in Valparaiso, Indiana was $.0094 per point (Havemeyer Tr. 8809-10; RA&PX 185, p. 10; RA&PX 234, p. 10). The calculation of this cost is shown in RA&PX 187, p. 5 (Havemeyer Tr. 8810; see also RA&PX 234, p. 87).

912. The cost per point was obtained by dividing the total selling expenses incurred by Borden in connection with its sales by dairy brokers operating out of the Hammond Branch, $4,598, by the points delivered by those brokers (Havemeyer Tr. 8810; RA&PX 187, p. 5; RA&PX 234, p. 87). The selling expense is composed of an item for travel expense of $421, a miscellaneous expense - actually a deduction from the selling account of $195 - and a transfer from another account of $4,372 (Havemeyer Tr. 8811-8812; RA&PX 187, p. 5; RA&PX 234, p. 87). These items were taken directly from the Borden accounting record for delivery to dairy brokers, RA&PX 87 - included in RA&PX 185 as page 137 (Havemeyer Tr. 8811-13).

The transfer is the same amount that was transferred out on RA&PX 85, the Borden record of Hammond wholesale selling expenses (compare entry in "Trans. To Other Exp. AC" on RA&PX 85 with the entry in "Trans. From Other Dept." on RA&PX 87; Havemeyer Tr. 8812-14). Thus, although this transfer, which constitutes almost the entire selling expense incurred by Borden in connection with its dairy broker business, is entered in an account identified as a delivery expense account, it is clear that it is, in fact, a selling expense (Havemeyer Tr. 9090).

913. In calculating the branch selling expenditures applicable to dairy borkers, Mr. Havemeyer used the actual figures for the month of October 1969 as opposed to the average monthly figures that he had used in calculating this cost for the regular wholesale routes at Hammond (Havemeyer Tr. 8811-14, 9090). He did so because an analysis of Borden's records of its expenses for selling activities in connection with its dairy broker business, RA&PX 87, reveals that Borden had experienced an upward trend in its selling costs, and was consciously spending ever-increasing amounts of money in selling in this area (Havemeyer Tr. 9090-91). Thus, Mr.

Havemeyer deemed it appropriate to use the actual figure for October 1969 sales expenditures to dairy brokers rather than an average figure. The use of an average figure based on a prior period would not have accurately reflected the amount of monthly expenses (Havemeyer Tr. 9902).*

914. The total points by which the dairy broker branch selling expense was to be divided was determined by subtracting the points sold to A&P from the 510,211 points sold from the Hammond Branch to milk distributors in October 1969 (Havemeyer Tr. 8814; RA&PX 81).

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* That Mr. Havemeyer used only the lower average figures in calculating the branch selling expenses for the regular wholesale routes at Hammond, including the amount transferred out to RA&PX 87, does not vitiate this conclusion. Since Mr. Havemeyer had used average figures for the additions to the selling expense account at Hammond in his analysis of RA&PX 85, it was only appropriate to use average figures for the subtraction -- *i.e.*, the transfer to RA&PX 87 -- as well (Havemeyer Tr. 9092-93). As is pointed out above (A&P Finding 900), Mr. Havemeyer's determination of the branch selling expense at Hammond was substantially less than that determined by Borden for October 1969 because he had used average figures for each item of expenditures except wages. To then have subtracted the higher monthly transfer figure, would have been grossly unsound.

12. Credit and Collection Expense - Hammond

915. The average credit and collection expense incurred by Borden in serving the non-A&P customers in Gary and Hammond, Indiana was $.006598 per point (RA&PX 234, pp. 3-9; see also RA&PX 185, pp. 3-9). Borden sustained no credit or collection cost in reference to the A&P account (RA&PX 234, pp. 3-10; RA&PX 195, pp. 3-10). The calculation of the average credit loss per point incurred by the Borden Company in serving the allegedly injured customers is set out on page 175 of RA&PX 185 (Havemeyer Tr. 8815; see also RA&PX 234, p. 90).

916. From a Borden accounting record, introduced into the record as RA&PX 83, Mr. Havemeyer obtained Borden's total credit and collection expenses in Hammond, Indiana for the year to and including October 1969 of $68,233. The Borden records in turn broke out this credit and collection expense among Borden's milk regular, milk distributor and trailer run accounts (Havemeyer Tr. 8816 and 8817; RA&PX 80-83). From this credit and collection expense, Mr. Havemeyer excluded $39,299 which the Borden records associate with milk distributors and $9,693 which Borden's records associate with

trailer runs because these expenses were not incurred in connection with the serving of Borden customers in the Gary-Hammond, Indiana areas (Havemeyer Tr. 8816 and 8817-8818). Only the remaining $19,241 credit and collection expense associated with Borden's "milk regular" operation (RA&PX 80) was charged against Borden's Indiana customers.

917. Mr. Havemeyer used the year-to-date figure and divided it by 10 to get an average per month figure of $1,924 because the credit and collection expenses in any particular month could be atypical (Havemeyer Tr. 8818). Since the Borden regular account consisted of both retail sales to Borden customers receiving home deliveries and regular wholesale customers, Mr. Havemeyer further subtracted 12% of the credit and collection expenses and assigned it to the retail customers (Havemeyer Tr. 8818). Although approximately 24% of the total milk regular sales were to retail customers, Mr. Havemeyer assigned only 12% of the credit and collection expense to those accounts on the basis of his own judgment and observation in the dairy industry (Havemeyer Tr. 8819-20).

Only a small fraction of the credit and collection function is allocable to retail customers because this function is performed by the routeman with the result that a dairy's out-of-pocket credit and collection expense on retail accounts is quite small (Havemeyer Tr. 8823).

918. The credit and collection account of Borden is primarily concerned with losses incurred due to interest on overdue accounts and provision for bad accounts (Havemeyer Tr. 2627; RA&PX 84). The provisions in Borden's accounts for interest on overdue accounts and for bad accounts is different from the provision for bad loans included in Borden's Hammond selling expenses, RA&PX 85 (Havemeyer Tr. 8790-91).

919. It was appropriate to charge these credit and collection expenses in part against Borden's allegedly injured Indiana customers, as was done by Mr. Havemeyer, since all of those customers were in arrears in payment of their accounts. RA&PX 238 shows that the Joseph Tittle & Sons store in Valparaiso had an average credit balance

outstanding to the Borden Company in October 1969 of $10,939.04. Borden's weekly sales to this store in the same period was only $2,991.15. The Joseph Tittle store in Highland, with average weekly sales of $779, was in arrears in its payments to Borden in October 1969 in the amount of $2,221. Model, with weekly sales in October 1969 of $667, was in arrears in the amount of $1,610. Wallies Supermarket, with average sales of $634 was in arrears in its payments to Borden by $4,998. Burger's Supermarket, with average weekly sales of $2,787, owed Borden $9,905.*

920. Complaint Counsel's argument that these expenses should have also been allocated to A&P because, they claim, A&P was Borden's Biggest credit customer" (C.C. Br. 227) is unfounded. It was not shown that A&P was ever in arrears in its payments, that provision for bad debts was necessary for it, or that collection expense was incurred for its account. Thus, there is no reason to allocate this expense to it.

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* It was not possible to determine the credit balance for the Joseph Tittle stores at Lake Street and Village Court and for Wilco Food Store in Gary because the records were not legible.

921. At pages 222 and 226 of their brief and findings, Complaint Counsel suggest that this credit expense should be allocated either on a "number of customers" basis or only to the actual extent each individual credit customer generates such costs. Both approaches lack merit. Again it demonstrates Complaint Counsel's misunderstanding of the Borden (Bowman) classification analysis. Once it can be shown that certain customers are properly within a class based upon the fact that they enjoy an additional service, as respondent has shown as to all allegedly injured customers receiving credit from Borden, the cost allocation need only be as accurate as is practicable. The only viable method of allocating these credit costs was on a per unit or volume basis as Mr. Havemeyer did in his analysis.

13. Credit and Collection Expense - Valparaiso

922. The credit and collection expense attributable to the Joseph Tittle store in Valparaiso was $.008059 (RA&PX 23, p. 10; RA&PX 185, p. 10). The calculation of this expenditure is set out on page 175, RA&PX 185 (Havemeyer Tr. 8841). The total credit and collection expenses incurred by Borden in the year to October 1969 was $39,299 (RA&PX 185, p. 175; RA&PX 234, p. 90; RA&PX 81; Havemeyer Tr. 8841-42).

This figure was again reduced to an average monthly figure of $3,930, which was divided by the points subject to credit risk. These points were determined by subtracting the A&P points sold in Valparaiso from the 510,211 points (RA&PX 81), sold to Borden's milk distributors (Havemeyer Tr. 8842-43). As stated above,(A&P Findings 919-921), it was appropriate to charge a part of this credit and collection cost to the Tittle, Valparaiso store, since Tittle and the Valparaiso store, in particular, were in arrears in its payments to Borden.

14. Borden Label Advertising Expense - Hammond

923. The cost per point of Borden label advertising in the Gary-Hammond area was $.001401 (RA&PX 234, pp. 3-10). The calculation of this cost is shown on RA&PX 185, pages 125 and 169 (Havemeyer Tr. 8852). The revised calculation in the final cost study is shown on pages 78 and 88 of RA&PX 234.

924. From a Borden record (RA&PX 90, p. 3), Mr. Havemeyer determined that the total cost of media advertising by Borden in the Chicago Metropolitan area in 1969 was $114,258. He then allocated

$8,192 of this to Lake County, Indiana, which includes Gary and Hammond, on the basis of the ratio of that county's population to the total population in the Chicago Metropolitan area (Havemeyer Tr. 8853-55). This yearly figure was, in turn, divided by 12 to give a monthly average figure of $683. To this amount, Mr. Havemeyer added, on the basis of his general experience (Havemeyer Tr. 8861-62), 19% of the monthly media advertising expenses or $130 for estimated production expenses incurred by Borden in preparing its materials for display through the advertising medium (Havemeyer Tr. 8855-56, 8859; RA&PX 234, p. 88). An additional $9 per month was added to the advertising expense to represent directory and miscellaneous advertising expenditures per the Borden accounting records (Havemeyer Tr. 8859-60).

925. Having determined the advertising expense applicable to the Gary-Hammond area of $822, Mr. Havemeyer then divided this by the advertising sensitive points in that area to arrive at a cost per point of $.001407 (RA&PX 234, p. 88).

926. Mr. Havemeyer determined the advertising sensitive points by subtracting the sales to A&P and to canteens from the total sales, both wholesale and retail, on the Hammond routes (Havemeyer Tr. 8860). The private label points to A&P were properly excluded because Borden advertising does not promote sales of a product identified with the A&P label. Canteen points are subtracted because these sales are not influenced by advertising. Once the vending arrangement has been made and the Borden label products are put in the vending machines at the location of the canteen, the people at the location of that canteen buy what is in that vending machine, or they do without (Havemeyer Tr. 8864). Only milk and dairy products sold in regular grocery stores are advertising sensitive. Whereas a worker at a location at which a machine is located is extremely unlikely to go to some other location because he desires a particular brand of milk, the housewife can more readily go to the next block to buy another label product at a different store or, as is frequently the case, in the same store if the store carries two labels (Havemeyer Tr. 8864-65). Contrary to Complaint Counsel's speculations (C.C. Br. 234), the sole evidence in the record concerning

advertising sensitivity demonstrates that only milk and dairy products sold in regular grocery stores are advertising sensitive.

927. Complaint Counsel maintain that the allocation of the bulk of the advertising expense is improper because it was directed to the introduction of four new products into the Borden line, only one of which was involved in the Borden-A&P private label agreement (C.C. Br. 229-31). As Mr. Havemeyer explained, however, it would not be appropriate to charge the advertising costs to just those four items because the advertising was in the nature of institutional advertising directed toward the promotion of the sale of Borden's entire line of Borden label products (Havemeyer Tr. 9638-46). In support of his analysis, Mr. Havemeyer presented an exhibit, RA&PX 244, which illustrates the effect of charging the entire cost of the media advertising to the specified products rather than allocating it to the entire Borden product line (Havemeyer Tr. 9641-42). This exhibit demonstrates just how absurd Complaint Counsel's present argument is.

928. RA&PX 244 sets out in Column A the total amount spent by Borden in 1969 in advertising three of the four items -- there were no sales records on the fourth item (Havemeyer Tr. 9642). In Column B he increased these expenditures by 19% to account for production expenses attendant on the preparation of the advertising. He allocated 7.17% of the expenses to the Gary-Hammond area of Indiana on the basis of population (Havemeyer Tr. 9642-43). In Column F, Mr. Havemeyer has shown the estimated annual sales of these three products, based on actual sales of these three products in the Chicago Metropolitan Region for the first ten months of 1969 (Havemeyer Tr. 9643-44). Dividing the portion of the advertising expense for each of these products allocable to Hammond by the estimated annual sales of these products in that same area, he obtained an advertising expense per unit (Havemeyer Tr. 9644). He then compared these expenditures with the net price charged to one of the allegedly injured customers in the Gary-Hammond area and determined that advertising as a percentage of the net sales prices for each of these items was as follows:

Yogurt - 20.36%
Lite-Line Milk - 139.77%
Dips - 163.90% (Havemeyer Tr. 9644-45; RA&PX 244)

929. RA&PX 244 demonstrates just how ludicrous it is to argue that the advertising was incurred for these items only. We have already pointed out that Borden's average net profit on its sales was less than 4% (A&P Finding 600). At that rate, it would take Borden 41 years to simply recover its advertising expenditure on dips, 35 years on lite-line milk, and a mere 4 years on yogurt. Clearly, therefore, this advertising was directed to promotion of the Borden name in general. These particular products were merely the medium by which Borden chose to promote its name. Any other conclusion is absurd.

930. Complaint Counsel also protest that there was no evidence demonstrating the existence of a production expense. They are wrong. Mr. Havemeyer testified that the addition of such an expense was required on the basis of his experience with costs of this sort (Havemeyer Tr. 8856, 8861-62). Mr. Havemeyer is well qualified and such evidence is quite probative.

931. Complaint Counsel also argue that an unspecified portion of Borden label advertising cost should be attributed to A&P because increased Borden sales means economies for everyone (C.C. Br. 232, 233). That argument is unmeritorious, as we have previously demonstrated (A&P Finding 753).

15. Borden Label Advertising Expense - Valparaiso

932. The advertising expense per point charged to the Joseph Tittle store in Valparaiso was $.00542 (RA&PX 234, p. 10; RA&PX 185, p. 10). The calculation of this cost is set out on page 169 of RA&PX 185 (Havemeyer Tr. 8866; see also RA&PX 234, p. 88).

933. Of the total media advertising expense of the $114,258 incurred by Borden in the 1969 Metropolitan Chicago area, $1,303 was assigned to the Porter County area of Indiana in which Valparaiso is located on the basis of the ratio of that county's population to the total population in the Chicago Metropolitan area. An average figure of $109 per month was determined to which were added production expenses of $21. $135 in directory and miscellaneous advertising expenses was also added per the Borden records (RA&PX 81).

The total advertising expense attributable to dairy products was thus determined to be $265 for the month of October 1969. This amount was again divided by the advertising sensitive points -- in this case the total points sold through dairy brokers less the points sold in the A&P store in Valparaiso -- to obtain an advertising cost per point of $.00542 (RA&PX 234, p. 88; Havemeyer Tr. 8866-74).

934. Complaint Counsel offer the same discredited objections to the allocation of Valparaiso advertising expenses as they put forward in opposition to the Hammond analysis. Their objections are without merit (A&P Findings 748-755).

16. Borden Label Merchandising Expense - Hammond

935. The Borden label merchandising expense for the Gary-Hammond, Indiana area was $.002045 per point (RA&PX 234, pp. 3-9; RA&PX 185, pp. 3-9). The calculation of this cost is shown on pages 125 and 142 of RA&PX 185 (Havemeyer Tr. 8876; see also RA&PX 234, pp. 78 and 81). No cost of merchandising

was charged to A&P because under the terms of the private label arrangement, A&P did not receive such services (CX 62Q).

936. The merchandising expense incurred by Borden in serving its customers in Hammond in 1969 was obtained by Mr. Havemeyer from Borden accounting records which had been introduced in evidence as RA&PX 86 (Havemeyer Tr. 8876-77). RA&PX 86 is the Borden expense account for Hammond milk delivery. None of its sub-accounts expressly states that it relates to merchandising activities. Mr. Havemeyer's expertise was required to identify such expenditures. The expenditures which he determined as being related to merchandising were entries in two sub-accounts identified as expenses incurred by Borden in connection with the repair and lease of cabinets for dairy products supplied by Borden to its customers (Havemeyer Tr. 8878).

937 Again the main thrust of complainant's argument is a demand for a more precise classification of stores on the basis of the merchandising expenses each one received (CC Br. 237). No data was available at the time of the trial which would permit any such direct

allocation of merchandising expenses to individual customers and it is reasonable to allocate such expenses in proportion to the volume of business they were aimed at generating. Although Complaint Counsel contend that the identification of the "rent leased cab. and comp." as a merchandising expense was unjustified (C.C. Br. 236), it was made on the basis of Mr. Havemeyer's experience with expenses of this sort. Furthermore, there were other expenses normally associated with merchandising and support efforts which could have been included and were not. Mr. Havemeyer's analysis of the merchandising function did not include any expenses for such normal merchandising support efforts as furnishing merchandising materials, demonstrators or special displays. What is apparent is that A&P, according to its contract, received no merchandising support. Other customers were entitled to such a service and expenses were generated. It's clearly appropriate for Mr. Havemeyer to charge the expense to Borden of supplying and maintaining equipment to those customers who are entitled to such service. Wallies Modell, Wilco and Tittle all received free equipment from Borden (Barnes Tr. 3910-12; Barney Tr. 3695; pp. 3743-44; Gintert Tr. 2465-68, 2514-15, p. 44; Minard Tr. 3184-87). In addition, all of the allegedly injured customers received demonstrators, promotional material, free samples and other merchandising support (Barnes Tr. 3867, Minard Tr. 3209-09; Barney Tr. 3696, 3809-10; Gintert Tr. 2468, 2516; Kristof Tr. 2281, 2378, 2433).

17. Borden Label Merchandising Expense - Valparaiso

938 Mr. Havemeyer did not calculate any merchandising cost for the Joseph Tittle store in Valparaiso, although Tittle was entitled to such service from Borden. Indeed, the representative of Tittle, Mr. Minard, testified that the Tittle store in Valparaiso had received $25 for a demonstrator (Minard Tr. 3249-52; Havemeyer Tr. 8882). Under the terms of the private label arrangement, the A&P store in Valparaiso received no merchandising support.

18. General Selling and Administrative Expense - Hammond

939 Mr. Havemeyer determined that the general selling and administrative or overhead expense to be charged against all the Hammond customers, A&P and the complaint customers, was 5.33% of all other marketing costs (Havemeyer Tr. 8884). The determination of this percentage is set out on page 174 of RA&PX 185 (Havemeyer Tr. 8884; see also RA&PX 234, p. 89).

940 In calculating the overhead expense to be allocated to the various customers Mr. Havemeyer first took all the direct expenses of the Borden Company for regular milk sales at Hammond for the year to October 1969 from the Borden accounting records introduced as RA&PX 80. He added to this the media advertising and attendant production expenses and arrived at a total marketing expense, excluding overhead costs. From the same Borden document (RA&PX 80) he then obtained the district administrative and overhead expenses. He divided these by the other marketing expenses to arrive at the ratio of 5.33% (RA&PX 234, p. 89; RA&PX 185, p. 173; Havemeyer Tr. 8885-87).

941 Complaint counsel's argument that overhead expense is related to more than these several branch functions and consequently must be excluded from the study is unsound. Some general selling and administrative costs must be allocated to each customer, and Mr. Havemeyer simply follows the universally accepted method of allocating such costs in his analysis (See A&P Finding 778).

942 Complaint Counsel argue that Mr. Havemeyer had no knowledge of what activities or operations went on at the Central office (CC. Br. 242). While it may

be true that he had no personal knowledge of those particular activities, this does not in any way detract from his methodology because Mr. Havemeyer had an informed basis to make this assessment due to his expertise and familiarity with the dairy industry.

943 Moreover, Complaint Counsel claim that Mr. Havemeyer's allocations both here in the Hammond analysis and in the Valparaiso analysis below produce "ridiculous results." (CC Br. 242) They offer no evidence, however, to support their contention that the allocation of Central office expense of $212.23 to Burger for a month is improper. That allocation was based on methods which both Mr. Havemeyer and Mr. Lemberg (A&P Finding 778) regard as sound. Burger's was a substantial account and there is no basis on which to conclude that the various support and supervisory services rendered by the Central office for this account did not result in the incurring of such a cost.

19. General Selling and Administrative Expense - Valparaiso

944 Mr. Havemeyer determined that the overhead expenses in Valparaiso was 8.92% of the other marketing expense (Havemeyer Tr. 8889) The calculation of this ratio is

set out on page 177 of RA&PX 185 (see also RA&PX 234, p. 91). This expense was calculated in the identical manner as for Gary - Hammond except that the data was derived from the Borden record for milk distributors (RA&PX 81; Havemeyer Tr. 8890-93; RA&PX 234, p. 91; RA&PX 185, p. 177).

20. Conclusion

945 The results of Mr. Havemeyer's study are set out below. The physical delivery costs for A&P and all the allegedly injured customers are those developed in these findings.

COMPARISON OF DIFFERENCE IN MARKETING COST PER POINT
INCURRED BY BORDEN AND DIFFERENCE IN NET PRICES PER POINT
CHARGED BY BORDEN
A&P PRIVATE LABEL VS BURGER'S FOOD MARKET, HAMMOND
HAMMOND BRANCH - OCTOBER 1969

MARKETING COST ELEMENTS	A & P PRIVATE LABEL	BURGER'S FOOD MARKET EQ PVT LABEL	
TRUCK LOADING:	.001515	.001508	(A&P Finding 813)
PHYSICAL DELIVERY:	.024984	.020341	(A&P Finding 858)
BRANCH CLERICAL COST:	.002260	.000899	(A&P Finding 884)
PRODUCT WASTE:	.000000	.002575	(A&P Finding 886)
BRANCH SELLING EXPENSE:	.000000	.023035	(A&P Finding 896)
AVERAGE CREDIT LOSS PER POINT:	.000000	.006598	(A&P Finding 915)
BORDEN LABEL EDVERTISING EXPENSE:	.000000	.001401	(A&P Finding 923)
BORDEN LABEL MERCHANDISING EXPENSE:	.000000	.002045	(A&P Finding 935)
SUB TOTAL:	.028759	.058402	
GENERAL SELLING AND ADMINISTRATIVE EXPENSE AT 5.33667%:	.001535	.003117	(A&P Finding 939)
TOTAL MARKETING COST:	.030294	.061519	
MARKETING COST PER POINT IN EXCESS OF COST TO SERVE A&P:		.031225	
NET PRICE PER POINT:	.195224	.225955	(RA&PX 234, p. 3)
PERCENT DISC. TO EQUAL A&P PRICE:		12.72%	(RA&PX 234, p. 3)
PRICE PER POINT ABOVE A&P PRICE:		.028741	(RA&PX 234, p. 3)
NET DIFFERENCE IN PRICE LESS NET DIFFERENCE IN MARKETING COST:		.002484	
NET DISCRIMINATION IN FAVOR OF:		.002484	

COMPARISON OF DIFFERENCE IN MARKETING COST PER POINT
INCURRED BY BORDEN AND DIFFERENCE IN NET PRICES PER POINT
CHARGED BY BORDEN
A & P PRIVATE LABEL VS MODEL FOOD CENTER, HAMMOND
HAMMOND BRANCH - OCTOBER 1969

MARKETING COST ELEMENTS	A & P PRIVATE LABEL	MODEL FOOD CENTER EQ PVT LABEL	
TRUCK LOADING:	.001515	.001522	(A&P Finding 813)
PHYSICAL DELIVERY:	.024984	.044296	(A&P Finding 858)
BRANCH CLERICAL COST:	.002260	.004767	(A&P Finding 884)
PRODUCT WASTE:	.000000	.002575	(A&P Finding 886
BRANCH SELLING EXPENSE:	.000000	.023035	(A&P Finding 896)
AVERAGE CREDIT LOSS PER POINT:	.000000	.006598	(A&P Finding 915)
BORDEN LABEL ADVERTISING EXPENSE:	.000000	.001401	(A&P Finding 923)
BORDEN LABEL MERCHANDISING EXPENSE:	.000000	.002045	(A&P Finding 935)
SUB TOTAL:	.028759	.086239	
GENERAL SELLING AND ADMINISTRATIVE EXPENSE AT 5.33667%:	.001535	.004602	(A&P Finding 939)
TOTAL MARKETING COST:	.030294	.090841	
MARKETING COST PER POINT IN EXCESS OF COST TO SERVE A&P:		.060547	
NET PRICE PER POINT:	.195224	.228077	(RA&PX 234, p. 4)
PERCENT DISC. TO EQUAL A&P PRICE:		14.39%	(RA&PX 234, p. 4)
PRICE PER POINT ABOVE A&P PRICE:		.032820	(RA&PX 234, p. 4)
NET DIFFERENCE IN PRICE LESS NET DIFFERENCE IN MARKETING COST:		.027727	
NET DISCRIMINATION IN FAVOR OF:		.027727	

COMPARISON OF DIFFERENCE IN MARKETING COST PER POINT
INCURRED BY BORDEN AND DIFFERENCE IN NET PRICES PER POINT
CHARGED BY BORDEN
A & P PRIVATE LABEL VS WALLIES MARKET, HAMMOND
HAMMOND BRANCH - OCTOBER 1969

MARKETING COST ELEMENTS	A & P PRIVATE LABEL	WALLIES MARKET EQ PVT LABEL	
TRUCK LOADING:	.001515	.001522	(A&P Finding 813)
PHYSICAL DELIVERY:	.024984	.043662	(A&P Finding 858)
BRANCH CLERICAL COST:	.002260	.004370	(A&P Finding 884)
PRODUCT WASTE:	.000000	.002575	(A&P Finding 886)
BRANCH SELLING EXPENSE:	.000000	.023035	(A&P Finding 896)
AVERAGE CREDIT LOSS PER POINT:	.000000	.006598	(A&P Finding 915)
BORDEN LABEL ADVERTISING EXPENSE:	.000000	.001401	(A&P Finding 923)
BORDEN LABEL MERCHANDISING EXPENSE:	.000000	.002045	(A&P Finding 935)
SUB TOTAL:	.028759	.085208	
GENERAL SELLING AND ADMINISTRATIVE EXPENSE AT 5.33667%:	.001535	.004547	(A&P Finding 939)
TOTAL MARKETING COST:	.030294	.089755	
MARKETING COST PER POINT IN EXCESS OF COST TO SERVE A&P:		.059461	
NET PRICE PER POINT:	.195224	.231515	(RA&PX 234, p. 8)
PERCENT DISC. TO EQUAL A&P PRICE:		15.09%	(RA&PX 234, p. 8)
PRICE PER POINT ABOVE A&P PRICE:		.034936	(RA&PX 234, p. 8)
NET DIFFERENCE IN PRICE LESS NET DIFFERENCE IN MARKETING COST:		.024525	
NET DISCRIMINATION IN FAVOR OF:		.024525	

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COMPARISON OF DIFFERENCE IN MARKETING COST PER POINT
INCURRED BY BORDEN AND DIFFERENCE IN NET PRICES PER POINT
CHARGED BY BORDEN
A & P PRIVATE LABEL VS WILCO FOOD CENTER, GARY
HAMMOND BRANCH - OCTOBER 1969

MARKETING COST ELEMENTS	A & P PRIVATE LABEL	WILCO FOOD CENTER EO PVT LABEL	
TRUCK LOADING:	.001515	.001516	(A&P Finding 813)
PHYSICAL DELIVERY:	.024984	.016488	(A&P Finding 858)
BRANCH CLERICAL COST:	.002260	.000972	(A&P Finding 884)
PRODUCT WASTE:	.000000	.000000	(A&P Finding 886)
BRANCH SELLING EXPENSE:	.000000	.023035	(A&P Finding 896)
AVERAGE CREDIT LOSS PER POINT:	.000000	.006598	(A&P Finding 915)
BORDEN LABEL ADVERTISING EXPENSE:	.000000	.001401	(A&P Finding 923)
BORDEN LABEL MERCHANDISING EXPENSE:	.000000	.002045	(A&P Finding 935)
SUB TOTAL:	.028759	.052055	
GENERAL SELLING AND ADMINISTRATIVE EXPENSE AT 5.33667%:	.001535	.002778	
TOTAL MARKETING COST:	.030294	.054833	
MARKETING COST PER POINT IN EXCESS OF COST TO SERVE A&P:		.024539	
NET PRICE PER POINT:	.195224	.209353	(RA&PX 234, p.9)
PERCENT DISC. TO EQUAL A&P PRICE:		6.94%	(RA&PX 234, p.9)
PRICE PER POINT ABOVE A&P PRICE:		.014529	(RA&PX 234, p.9)
NET DIFFERENCE IN PRICE LESS NET DIFFERENCE IN MARKETING COST:		- .010010	
NET DISCRIMINATION IN FAVOR OF:		- .010010	

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COMPARISON OF DIFFERENCE IN MARKETING COST PER POINT
INCURRED BY BORDEN AND DIFFERENCE IN NET PRICES PER POINT
CHARGED BY BORDEN
A&P PRIVATE LABEL VS JOSEPH TITTLE & SONS, HIGHLAND HAMMOND
HAMMOND BRANCH - OCTOBER 1969

MARKETING COST ELEMENTS	A & P PRIVATE LABEL	JOSEPH TITTLE & SONS EQ PVT LABEL	
TRUCK LOADING:	.001515	.001535	(A&P Finding 813)
PHYSICAL DELIVERY:	.024984	.044556	(A&P Finding 858)
BRANCH CLERICAL COST:	.002260	.003990	(A&P Finding 884)
PRODUCT WASTE:	.000000	.002575	(A&P Finding 886)
BRANCH SELLING EXPENSE:	.000000	.023035	(A&P Finding 896)
AVERAGE CREDIT LOSS PER POINT:	.000000	.006598	(A&P Finding 915)
BORDEN LABEL EDVERTISING EXPENSE:	.000000	.001401	(A&P Finding 923)
BORDEN LABEL MERCHANDISING EXPENSE:	.000000	.002045	(A&P Finding 935)
SUB TOTAL:	.028759	.085735	
GENERAL SELLING AND ADMINISTRATIVE EXPENSE AT 5.33667%:	.001535	.004575	(A&P Finding 939)
TOTAL MARKETING COST:	.030294	.090310	
MARKETING COST PER POINT IN EXCESS OF COST TO SERVE A&P:		.060016	
NET PRICE PER POINT:	.195224	.214457	(RA&PX 234, p. 5)
PERCENT DISC. TO EQUAL A&P PRICE:		5.30%	(RA&PX 234, p. 5)
PRICE PER POINT ABOVE A&P PRICE:		.011366	(RA&PX 234, p. 5)
NET DIFFERENCE IN PRICE LESS NET DIFFERENCE IN MARKETING COST:		.048650	
NET DISCRIMINATION IN FAVOR OF:		.048650	

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COMPARISON OF DIFFERENCE IN MARKETING COST PER POINT INCURRED BY BORDEN AND DIFFERENCE IN NET PRICES PER POINT CHARGED BY BORDEN
A&P PRIVATE LABEL VS JOSEPH TITTLE & SONS, LAKE ST. HAMMOND
HAMMOND BRANCH - OCTOBER 1969

MARKETING COST ELEMENTS	A & P PRIVATE LABEL	JOSEPH TITTLE & SONS EQ PVT LABEL	
TRUCK LOADING:	.001515	.001531	(A&P Finding 813)
PHYSICAL DELIVERY:	.024984	.037013	(A&P Finding 858)
BRANCH CLERICAL COST:	.002260	.002502	(A&P Finding 884)
PRODUCT WASTE:	.000000	.002575	(A&P Finding 886)
BRANCH SELLING EXPENSE:	.000000	.023035	(A&P Finding 896)
AVERAGE CREDIT LOSS PER POINT:	.000000	.006598	(A&P Finding 915)
BORDEN LABEL EDVERTISING EXPENSE:	.000000	.001401	(A&P Finding 923)
BORDEN LABEL MERCHANDISING EXPENSE:	.000000	.002045	(A&P Finding 935)
SUB TOTAL:	.028759	.076700	
GENERAL SELLING AND ADMINISTRATIVE EXPENSE AT 5.33667%:	.001535	.004093	(A&P Finding 939)
TOTAL MARKETING COST:	.030294	.080793	
MARKETING COST PER POINT IN EXCESS OF COST TO SERVE A&P:		.050499	
NET PRICE PER POINT:	.195224	.213263	(RA&PX 234, p. 6)
PERCENT DISC. TO EQUAL A&P PRICE:		5.5%	(RA&PX 234, p. 6)
PRICE PER POINT ABOVE A&P PRICE:		.011836	(RA&PS 234, p. 6)
NET DIFFERENCE IN PRICE LESS NET DIFFERENCE IN MARKETING COST:		.038663	
NET DISCRIMINATION IN FAVOR OF:		.038663	

COMPARISON OF DIFFERENCE IN MARKETING COST PER POINT INCURRED BY BORDEN AND DIFFERENCE IN NET PRICES PER POINT CHARGED BY BORDEN
A&P PRIVATE LABEL VS JOSEPH TITTLE & SONS, VILLAGE COURT GARY
HAMMOND BRANCH - OCTOBER 1969

MARKETING COST ELEMENTS	A & P PRIVATE LABEL	JOSEPH TITTLE & SONS EQ PVT LABEL
TRUCK LOADING:	.001515	.001535(A&P Finding 813)
PHYSICAL DELIVERY:	.024984	.031876(A&P Finding 858)
BRANCH CLERICAL COST:	.002260	.001792(A&P Finding 884)
PRODUCT WASTE:	.000000	.002575(A&P Finding 886)
BRANCH SELLING EXPENSE:	.000000	.023035(A&P Finding 896)
AVERAGE CREDIT LOSS PER POINT:	.000000	.006598(A&P Finding 915)
BORDEN LABEL ADVERTISING EXPENSE:	.000000	.001401(A&P Finding 923)
BORDEN LABEL MERCHANDISING EXPENSE:	.000000	.002045(A&P Finding 935)
SUB TOTAL:	.028759	.070857
GENERAL SELLING AND ADMINISTRATIVE EXPENSE AT 5.33667%:	.001535	.003781(A&P Finding 939)
TOTAL MARKETING COST:	.030294	.074638
MARKETING COST PER POINT IN EXCESS OF COST TO SERVE A&P:		.044344
NET PRICE PER POINT:	.195224	.214422 (RA&PX 234, p. 7)
PERCENT DISC. TO EQUAL A&P PRICE:		4.62% (RA&PX 234, p. 7)
PRICE PER POINT ABOVE A&P PRICE:		.009906(RA&PX 234, p. 7)
NET DIFFERENCE IN PRICE LESS NET DIFFERENCE IN MARKETING COST:		.034438
NET DISCRIMINATION IN FAVOR OF:		.034438

COMPARISON OF DIFFERENCE IN MARKETING COST PER POINT INCURRED BY BORDEN AND DIFFERENCE IN NET PRICES PER POINT CHARGED BY BORDEN
A&P PRIVATE LABEL VS JOSEPH TITTLE & SONS, VALPARAISO
VALPARAISO - OCTOBER 1969

MARKETING COST ELEMENTS	A & P PRIVATE LABEL	JOSEPH TITTLE & SONS EQ PVT LABEL
TRUCK LOADING:	.005000	.005000
PHYSICAL DELIVERY:	.016800	.016800
BRANCH CLERICAL COST:	.004500	.004500
PRODUCT WASTE:	.000000	.000000
BRANCH SELLING EXPENSE:	.000000	.009400
AVERAGE CREDIT LOSS PER POINT:	.000000	.008059
BORDEN LABEL EDVERTISING EXPENSE:	.000000	.000542
BORDEN LABEL MERCHANDISING EXPENSE:	.000000	.000000
SUB TOTAL:	.026300	.044301
GENERAL SELLING AND ADMINISTRATIVE EXPENSE AT 8.93362%:	.002350	.003953
TOTAL MARKETING COST:	.028650	.048259
MARKETING COST PER POINT IN EXCESS OF COST TO SERVE A&P:		.019609
NET PRICE PER POINT:	.187000	.207900
PERCENT DISC. TO EQUAL A&P PRICE:		4.64%
PRICE PER POINT ABOVE A&P PRICE:		.009647
NET DIFFERENCE IN PRICE LESS NET DIFFERENCE IN MARKETING COST:		.009963
NET DISCRIMINATION IN FAVOR OF:		.009963

Note: All entries are taken directly from RA&PX 234, p. 10.

946. The results of the comparisons of A&P's prices and costs with those for the four Tittle stores are summarized in the following table. It can be seen that there is a substantial over-justification of Borden's prices to A&P compared with its prices to the four Tittle stores.

SUMMARY, JOSEPH TITTLE & SONS
EXTENT OF OVER-JUSTIFICATION OF DIFFERENCE IN PRICE ABOVE A&P PRIVATE LABEL BY REASONS OF HIGHER MARKETING COST TO SERVE TITTLE VS. SERVING A&P (DELIVERY COSTS CALCULATED PER RA&PX 8 AND RA&PX 9)

	A	B	C	D
LOCATION	OVER-JUSTIFICATION PER EQUIV. PVT. LABEL PT.	EQUIV. PVT. LABEL POINTS 2 WKS. END 11/18/69(2)	ACTUAL TOTAL PRICE 2 WKS. END. 10/18/69(2)	AMOUNT OF OVER-JUSTIFICATION A X B
Highland, Hammond	.048650 (1)	5,378	$1,153.35	$ 261.64
Lake St., Hammond	.038663 (1)	7,199	$1,535.28	$ 278.33
Village Ct., Gary	.034438 (1)	10,050	$2,154.94	$ 346.10
Valparaiso	.009963 (2)	23,589	$4,733.32	$ 235.02
4 Store Total	.024258 (3)	46,216	$9,576.89	$1,121.09

(1) From Summary of Cost Discrimination attached, using predictor formula for delivery ti
(2) From RA&PX 234, p. 2
(3) Obtained by dividing Column D Total by Column B Total

SUMMARY, JOSEPH TITTLE & SONS
EXTENT OF OVER-JUSTIFICATION OF DIFFERENCE IN PRICE ABOVE A&P PRIVATE LABEL BY REASONS OF HIGHER MARKETING COST TO SERVE TITTLE VS. SERVING A&P
(DELIVERY COSTS CALCULATED PER RA&PX 8 AND RA&PX 9)

A	B	C	D	E
OVER-JUSTIFICATION PER EQUIV. PVT. LABEL PT.	EQUIV. PVT. LABEL POINTS 2 WKS. END 11/18/69(2)	ACTUAL TOTAL PRICE 2 WKS. END. 10/18/69(2)	AMOUNT OF OVER-JUSTIFICATION A X B	% OF OVER-JUSTIFICATION D/C
.048650 (1)	5,378	$1,153.35	$ 261.64	22.69%
.038663 (1)	7,199	$1,535.28	$ 278.33	18.13%
.034438 (1)	10,050	$2,154.94	$ 346.10	16.06%
.009963 (2)	23,589	$4,733.32	$ 235.02	4.97%
.024258 (3)	46,216	$9,576.89	$1,121.09	11.71%

f Cost Discrimination attached, using predictor formula for delivery time standards
, p. 2
viding Column D Total by Column B Total

947. In each of the comparisons set out above, the lower price charged to A&P is more than justified by the lower cost incurred by Borden in serving A&P. In every case, there is a net discrimination in favor of the allegedly injured customer. The amount of that discrimination and of the over-justification of the prices paid by A&P is as follows:

Customer	Over-Justification
BURGER'S FOOD MARKET HAMMOND	.002484
MODEL FOOD CENTER HAMMOND	.027727
WALLIES FOOD CENTER HAMMOND	.024525
WILCO FOOD CENTER GARY	.010010
JOSEPH TITTLE & SONS HIGHLAND HAMMOND	.048650
JOSEPH TITTLE & SONS LAKE ST. HAMMOND	.038663
JOSEPH TITTLE & SONS VILLAGE COURT GARY	.034438
JOSEPH TITTLE & SONS VALPARAISO	.009963

948. If the difference between Borden's costs of making delivery to A&P and each of the allegedly injured customers is subtracted from the over-justification set out in A&P Finding 947 above, it will be seen that Borden's prices to A&P will still remain cost-justified in every instance. Thus, even if the physical delivery costs determined in these findings are not considered, A&P has established its defense of cost-justification against all of the allegedly injured Indiana customers of Borden.

E. Concluding Arguments

1. Valparaiso Not Served From Hammond Argument

949. Complaint Counsel protest that Valparaiso may not have been served by Borden out of its Hammond branch (C.C. Br. 243-246). They, therefore, object to Mr. Havemeyer's using Hammond records for his calculation of Borden's costs of serving the A&P and Tittle store in Valparaiso.

950. Apparently, if Complaint Counsel are correct, the price comparison between the A&P and Tittle stores in Valparaiso is a completely random comparison. It is an isolated situation and has little or no bearing on the issues in this case. We doubt that even Complaint Counsel would claim that they had made out a charge of price discrimination under the Robinson-Patman Act on the basis of a single showing of a price differential between A&P and one of Borden's other customers. At the most, they would have shown a price discrimination in Valparaiso, Indiana, but without any showing, on their part, that Borden's costs in that city were typical of the average costs estimated by Mr. Malone on CX 54B and CX 87A-B, assuming for the purposes of argument, the propriety of their relying on such average costs as representative of conditions everywhere.

951. Moreover, there is no reason to believe that the results of Mr. Havemeyer's Valparaiso analysis would be significantly affected by the happenstance that the independent vendor, Mr. Marquardt, who served both the A&P and Tittle stores in Valparaiso, operated out of the Warsaw or South Bend Branches of Borden as

opposed to its Hammond Branch. How can Complaint Counsel be heard to protest Mr. Havemeyer's use of regional Hammond data as applicable to all branches in that region when Complaint Counsel have themselves relied on regional data for Chicago-Calumet (see title to CX 54B) and Metropolitan Chicago (see title to CX 87A). If Valparaiso is not served by a branch in Chicago-Calumet or Metropolitan Chicago, then the cost data on CX 54B and CX87A-B, in addition to their other defects, have no relation to Valparaiso and Complaint Counsel's price discrimination in that town is meaningless.

952. Even if it were established, however, that the Valparaiso stores were served out of some branch outside of the Chicago-Calumet area, and leaving aside the question of Complaint Counsel's burden of proving Borden's costs of operating in Valparaiso, it would not follow that Mr. Havemeyer could not apply Hammond Branch costs for vendors to his analysis in Valparaiso. It would be beyond the most stringent standards to require A&P to undertake yet another study of another of Borden's branches for the purpose of developing the costs for this single price comparison of one A&P store and one

allegedly injured customer in Valparaiso. At the time of Mr. Havemeyer's testimony, the cost incurred by A&P in completing the three studies presented at the trial was $125,000, and had consumed in excess of 5,000 hours (Havemeyer Tr. 9144). To demand yet another study for the purpose of a single comparison would be completely unreasonable and in complete disregard for the teachings of the cases.

2. Complaint Counsel's Attempted Reductio Ad Absurdum

953. Complaint Counsel have liberally sprinkled throughout their brief comments on what they characterize as absurd results from the application of Mr. Havemeyer's per point cost calculations to the point volumes of the allegedly injured customers. They offer no proof - merely their own assertion - that the total cost figure calculated for the customers must be too much. These calculations of absolute figures by Complaint Counsel prove nothing. Is $146 too much to charge the Tittle store for product waste (CC. Br. 203)? Is $286 too much to charge Wallies for sales expense (CC. Br. 219). Is $109 too great a merchandising cost to be allocated to Burger's (CC. Br. 238)? Is $212 too much central office expenditure to be charged to Burger (CC. Br. 292)? Is $337 too much to charge A&P for this same function? [243,531 points

x $.001385 (RA&PX 234, p. 3]. These figures cannot be shown to be erroneous without proof. The proper question to ask is did Mr. Havemeyer's studies follow generally accepted principles of allocation in the context of the records available to him. We submit that they did, and, consequently, his studies and their conclusions are valid.

954. Cost studies, when they are carefully conducted, frequently demonstrate that costs were unwisely or unprofitably incurred. Indeed, one of the principal uses of such studies in industry is to reveal such situations. Perhaps Borden operated uneconomically or inefficiently in providing selling services to its full service customers. Perhaps the money it devoted to merchandising or credit and collection activities was not well spent. It is nevertheless necessary in a Robinson-Patman cost justification situation to attempt to assign to each customer the costs for which he was responsible. That cannot be accomplished by the application of Complaint Counsel's judgment, or speculation, as to what they think was an appropriate cost to incur for a particular customer in performing a particular function. It can only be accomplished by a detailed analysis by a person expert in cost accounting in the industry and with the use of the best available records. The Case and Company study was such an analysis.

3. The Equal Availability Argument

955. Complaint Counsel seem to argue that, even if Borden's prices to A&P were cost justified, A&P does not have a defense unless it can also show that those prices were offered on some kind of proportional basis to others (C.C. Br. 114-16, 172, 172A, 191, 192, 297-300).

956. This effort to read the "proportionally equal" requirement of §§2(d) and (e) into §2(a) must fail. Although the term "proportionally equal" is used in §§2(d) and (e), the term is significantly absent from §2(a), thereby indicating that Congress intended to distinguish between §2(a) on the one hand, and §§2(d) and (e) on the other. Rowe states with reference to §§2(d) and 2(e): "The legislative history contemplates that promotional and no other arrangements were to be governed by the legal criteria of these provisions." F. Rowe, supra, §13.2 at 370 [emphasis supplied].

957. Rowe emphasizes that Congress intended that promotional activities be given special treatment in §§2(d) and 2(e). Contrasting these sections once more with §2(a), he concluded: "On the other hand, a seller's terms of sale or concessions not in respect of actual or purported promotional activities were to be measured by the legal provisions governing direct or indirect discriminations

in price." §13.2 at 372 [emphasis in original]. It is therefore irrelevant whether or not Borden offered proportionally equal services or terms of sale to other customers. The sole inquiry is whether any price differential between A&P and other customers are justified by a difference in the cost of serving them.

958. Moreover, as has been pointed out above (Vol. 1, pp. 342-50), there was no showing that A&P knew on what terms or at which prices Borden was selling to others, or what services it offered them.

Conclusion

Mr. Havemeyer's studies on Borden's anticipated profit on the private label bid and on the comparison of Borden prices and costs of serving A&P and the allegedly injured customers on the O'Hare and Hammond routes are soundly conceived and reliable, and should be adopted. They demonstrate, that Borden's prices to A&P are cost justified, and that Count II of the Complaint should be dismissed.

A&P PROPOSED FINDINGS OF FACT

APPENDIX TO VOLUME II

STATE OF WISCONSIN }
COUNTY OF DANE } SS

Joseph F. Malone, being duly sworn, on oath disposes and says:

First: that a study was made of the processing plants operations carried on at 1540 S. 108th St., Milwaukee, Wisconsin covering the week ended May 2, 1964. This study consisted of the preparation of a daily time record covering each person employed in the fluid milk processing plant, which time record disclosed the time utilized daily for each particular function and type of work performed. These time records were tabulated and form a major part of the processing cost data hereinafter described.

Second: that a study was made of nine (9) drop delivery routes, 6 of which operated from the Milwaukee wholesale branch located at 1540 S. 108th St., Milwaukee, Wisconsin and three (3) of which operated from the Madison branch located at 621 W. Washington St., Madison, Wisconsin, which study covered drop deliver operations for the week ended August 22, 1964. This study consisted of each route being timed by a competent non-company employee, employed by Messrs. Haskins & Sells. Each time study man accompanied each route daily for a period of one (1) week and made a record of the time required to perform each of the delivery functions by the route delivery man as well as data showing the volume delivered and the value of sales.

These two time and motion studies together with various analyses and studies made of other operating functions and expenses form the basis of data herewith presented to support the validity of the Drop Delivery Selling Price Schedule introduced by Borden under date of August 3, 1964, to wit:

MATERIAL AND MANUFACTURING COSTS

(a) Raw Products and Ingredients Used

The utilization and pricing of all raw milk purchased by Borden for its fluid milk processing plants located at Milwaukee, Madison, and La Crosse, Wisconsin is basically regulated by Federal Order No. 39, regulating the handling of milk in the Milwaukee, Wisconsin Marketing Area and Federal Order No. 51, regulating the handling of milk in the Madison, Wisconsin Marketing Area which area includes La Crosse, Wisconsin. Both of these Orders are so called two class Orders; Class I Milk representing the utilization of milk for fluid milk and fluid cream purposes and Class II Milk representing the utilization of milk for manufacturing purposes. These Federal Orders differ as to the pooling of producer milk for producer price purposes, in that the Milwaukee Federal Order No. 39 is an individual handler type of pool while the Madison Federal Order No. 31 is a market wide type of pool.

The prices announced by the Market Administrator for Class I milk testing 3.5% B. F. per hundred weights of milk of $3.96 for Milwaukee and $3.96 for Madison are minimum prices.

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Negotiations previously carried on with producer organizations established market premiums over the Federal Order announced prices which resulted in the established per hundred weight price for 3.5% butterfat Class I milk of $4.20 for Milwaukee and Madison and $4.12 for La Crosse. Some fluid milk sold in areas outside the "super pool" areas is paid for at the Market Administrators announced prices.

During August 1964 Borden's Wisconsin Region purchased a total of 19,049,386 pounds of Class I raw milk testing 3.455003% B. F. at a total procurement cost of $782,224.31, at an average cost of $4.106296 per hundred weight of fluid milk.

During August 1964 the average weighted butterfat test of all homogenized fluid milk processed by Borden's Wisconsin Region averaged 3.4069% B. F. The average butterfat tests of the other fluid milk products produced was as follows:

Product	Average Butterfat Test
2%	2.0518%
Skim milk	.5874%
Half and half	12.4667%
Cream	20.2220%
Whipping cream	32.8368%
Cereal special	7.3923%
Buttermilk	1.4490%
Chocolate drink	.3153%
Chocolate milk	3.5080%
Sour cream and dips	18.8731%

Unit costs for each product produced were developed based on the foregoing butterfat tests in accordance with the procedure established in the Federal Marketing Orders which recognizes separate values for butterfat and solids not fat. In accordance therewith it was determined that Class I fluid milk testing 3.4069% B. F. had an average cost of $4.072626 per hundred weight, of which $2.38483 represented butterfat values and $1.74730 represented a hundred weight solids not fats value.

These values were then applied to each product based on the butterfat and skim content in accordance with the butterfat tests indicated above. To this figure a 66/100 of 1% shrinkage factor representing the shrink experience for the calendar year 1963 was added.

The cost of ingredients used such as Vitamin D concentrate, additional milk solids for product fortification, sweeteners, chocolate, cultures, etc. was developed based on product formulae and cost records showing the purchased cost of such ingredients and such additional costs were added to the raw product costs.

The resulting information representing the per unit cost of raw products and ingredients is shown on Exhibit III.

(b) Container Costs

This cost was developed from Company purchase records which disclosed the per unit cost of each container used. Some of the products produced such as Glass Gallon Jugs used returnable containers and the shipping cases used in connection with all product items are all reusable cases. In those cases where a reusable

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container is involved, the container cost was based on Company records showing container trippage which formed the basis to determine reusable container costs.

Container costs represent and include Purpak paper containers in all sizes, glass bottles in gallon and half gallon sizes, cottage cheese cartons, glass bottle caps, and wood and wire shipping cases.

The resulting information representing the per unit cost of containers is shown on Exhibit III.

(c) Production Costs

This area of cost involves all of the processes required from the receiving of raw milk to the laying down of the finished products in the cold storage room or is loaded directly into trucks and vans. These processes are many and varied, performed by manpower and automated equipment with productive output covering the half gallon paper filler line geared to 75 half gallons per minute. The various processes include the cooking, homogenization, and clarification of the milk, separation of cream for higher test products, bottling, casing, culture development, cottage cheese making, etc.

(1) Labor

A study of plant operations was made of all production labor cost elements covering the week ended May 2, 1964. This study embraced all employees engaged in the various production functions. Each day, every employee was required to account by type and kind of work performed, the actual time in minutes to accomplish such functions, which total time for each employee daily was reconciled with the plant payroll record.

These individual detailed time sheets were summarized according to the many functional operations performed and to the extent possible labor utilization was applied to both products and functions on a direct basis.

The cost of the plant labor utilized was developed for each employee engaged in the processing operation and reconciled to the plant payroll record. Plant employees are members of the Teamsters and payroll rates, hourly and weekly, are governed by a Union contract in effect. The Union contract also provides for pensions, health and welfare contributions, vacations, holiday days off, etc. These additional benefit costs and payroll taxes, both Federal and State, were added to the base wage cost and a wage cost per minute developed. This per minute cost factor was then used to determine the labor cost by functions and product classifications covering the products produced during the period of the study based on the time records maintained.

The cost development considered the application of the direct time required to produce specific products as well as the direct time required to perform specific functional operations. This time was summarized from the daily study work record covering each employee during the study period. The plant labor utilized in general functions which was not directly related to a specific product or function was allocated to all products on the basis of the direct time utilized. Likewise the supervision cost was allocated in a similar manner.

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LIGHT, HEAT AND POWER

The cost of utility requirements is based on the average cost per period covering the eight (8) periods ended August 29, 1964. This cost averaged $2,023.97 per week. Since the Milwaukee plant is a dual operating plant producing both fluid milk products and frozan dessert products Borden maintains a separate account, Account 70 - "Power Refrigeration" in which account all expenses and costs relative to utility usage is collected and then charged to the respective departments; fluid milk - ice cream. A review of the departmental allocation of such total expense indicated that the division of such costs to the respective departments to be reasonable. Such costs during the eight periods ended August 29, 1964 averaged .0012 per point produced. This cost was allocated to the several products on the basis of direct labor utilization.

MATERIALS AND SUPPLIES

This element of expense represents generally cleaning supplies and the miscellaneous materials and supplies utilized in the production of goods. Their use and application is not directly to any particular product. The allocation of such expense was made on the basis of direct labor utilization. During the eight (8) periods ended August 29, 1964 this expense averaged .0005 per point produced.

PROPERTY EXPENSE

This category of expense includes depreciation and buildings and machinery and equipment, rental of property, both real and personal, taxes, insurance and other fixed charges of like nature.

In order to properly evaluate the areas creating this expense an inventory of the plant space utilized was developed as well as an inventory of each equipment item. Where the equipment used was related to specific assignable functions and specific product identification, such use was indicated. For example the rental of Exello packaging machines is directly related to the production of paper items while the depreciation on glass bottle washers is directly related to the production of glass items. Likewise the depreciation on equipment used for the production of cottage cheese is directly related to the production of cottage cheese items.

The portion of the various items of expense applicable to the various specific products or specific functions was allocated to such specific products and specific functions. The remainder of such expense was allocated to each product on the basis of the time required to produce the particular product.

During the eight (8) periods ended August 29, 1964 this category of expense averaged .0020 per point.

This area of expense carries an abnormal cost burden because of the leasing arrangement covering the building. No reconstruction of this cost has been made for the purposes of this presentation although for the purpose of cost development such consideration has some propriety.

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REPAIRS AND MAINTENANCE

This area of expense covers the cost of parts and supplies used to repair and maintain the equipment used in the processing operation together with the cost of labor required to make repairs and maintain the equipment.

During the eight (8) periods ended August 29, 1964 this expense averaged $.0011 per point. This expense was allocated to the various products on the basis of the total allocation to products made covering property expense.

ALL OTHER EXPENSE

This is an expense category designed to accumulate the processing expenses not covered by specific account classifications. During the eight (8) periods ended August 29, 1964 this expense averaged $.0006 per point.

DELIVERY, SELLING, AND ADMINISTRATIVE EXPENSE

Delivery Expense - Wholesale Drop Delivery

Effective August 3, 1964 Borden introduced a drop delivery schedule whereby the deliveryman's main function and responsibility was the dropping off at each drop delivery store customer's dock, those items which had been previously pre-ordered. Under the method of delivery introduced all deliveries are pre-ordered; deliveries are made on the basis of three (3) deliveries per week; the delivery tickets are prepared by the office; each customer is billed weekly, such billing being prepared by the office and the delivery man function is to deliver the merchandise, secure the customer's signature for the load delivered and drive the vehicle.

The Wisconsin Region operates a total of [illegible] drop delivery routes in Wisconsin. All but two (2) of such routes are operated by driver employees who are members of Teamster's Locals and payment is made in accordance with the terms of a negotiated Union contract. Under the terms of such Union contract Borden elected to pay its wholesale delivery men on a hourly basis as provided under the provisions of such contract. Under this contract, the work week in effect is established at 40 hours.

The two (2) drop off routes other than those operated by driver employees are run by independent contractors who make drop deliveries to Borden's store customers with payment for the service performed being based on a rate per mile operated.

The schedule introduced by Borden's Wisconsin Region on August 3, 1964 covering drop deliveries to wholesale store customers provided for a sliding scale of discounts related to dollar volume of purchases per delivery as follows:

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[illegible] Schedule

Delivery Volume per Delivery	Discount Rate
$ 40.00 - $ 44.99	10%
45.00 - . 49.99	11%
50.00 - 54.99	12%
55.00 - 59.99	13%
60.00 - 69.99	14%
70.00 - 84.99	16%
85.00 - 94.99	18-1/2%
95.00 - 119.99	20-1/2%
120.00 - 139.99	21-1/2%
140.00 - 159.99	22-1/2%
160.00 & over	23.6%

The requirements for drop delivery stipulated:

(1) Deliveries must be on a three-day per-week delivery basis.

(2) Customer must purchase a minimum of 200 points per delivery.

(3) Customer must pre-order products in advance of delivery.

(4) No special deliveries will be made except for driver failure to deliver in accordance with the pre-order.

(5) Sales ticket will be prepared by Borden's office on the basis of the pre-order and will be presented on delivery.

(6) Customer will be invoiced on a weekly basis.

(7) No credit for returns except for damaged or faulty merchandise.

(8) Customer must have ready, for driver pick up, empty bottles and cases.

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A&P PROPOSED FINDINGS OF FACT

Borden's Wisconsin Region undertook a survey of its drop delivery routes to ascertain certain operations data in connection with drop delivery methods as well as to develop operating costs data in supports of its discount schedule.

In this regard Borden's Wisconsin Region had scheduled such a study for a period in September 1964 which would allow for more normal sales and operating considerations due to the elimination of the summer seasonality factor which affects the normalcy of fluid milk operations during the months of July and August. However, due to the urgency of questions raised in regard to the drop delivery store discount schedule especially as to the provisions of the State of Wisconsin's Dairy Industry Trade Practice Law, a study was undertaken covering nine drop delivery routes for the week ended August 22, 1964.

A total of nine (9) representative drop delivery routes were selected for study. Six (6) of the nine (9) routes were operated from the Wisconsin Regions wholesale branch located at 1540 S. 108th St., Milwaukee, Wisconsin and three (3) were operated from the Madison branch located at 621 W. Washington St., Madison, Wisconsin. The routes selected were considered to reasonably reflect the overall drop delivery volume ratios.

In the course of the route study, analyses of the time spent on route activities were made on each of the nine (9) drop delivery routes operated by the Milwaukee and Madison branches. Each route was studied for a full week.

The time studies of the individual routes were made by individuals, employees of Haskins & Sells. For the purposes of the time study made by employees of Haskins and Sells special report forms were prepared and printed. This report form calls for the recording by the time study men of the minutes spent in making every delivery to each wholesale customer on the route, broken down into the type of activities performed.

The report forms were headed up showing the necessary reference data such as the route number, truck number, branch, driver's name, etc., assembled and placed in a bound folder.

All time study men were oriented as to their assignments; the study procedure to be followed; the reports required to be prepared by drivers and the operation of a route. A stop watch was furnished each time study man. The time study men were instructed to record a complete breakdown of total time spent by the driver but that they were not to interfere in any way with the activities of the driver. Each driver was also instructed by his supervisor to serve his route during the period of the route study in a manner similar to his usual custom and practice.

For the six days of the week during which the time study man was assigned to a particular route, the time study man was with the driver or his relief driver from the time when the driver or relief driver reported for work until he left work and checked his time out. By means of the stop watch, the various activities performed by the driver or his relief driver were timed to the nearest full minute and the minutes recorded by the time study man on the report form.

At the end of the time study week, the time study men turned in to their Haskins & Sells supervisor, the bound folders containing the report forms. The time reported for each driver and relief driver was reconciled with the Company's payroll record.

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The cost of the drivers and relief drivers time per minute was determined. This determination included the base pay of the driver and relief driver plus other wage costs such as pension and health and welfare costs, etc., and the average cost of drivers and relief drivers time thus ascertained.

A tabulation was made by customer of the point volume delivered, the value of sales of such deliveries and the time required to make the drop deliveries. This data was assigned to the particular sales volume bracket established under the Drop Delivery Discount Schedule. The time in minutes was multiplied by the developed rate per minute and the costs of making the deliveries by sales volume classification was determined. The remaining time generally representing driving time was ascertained in like manner and allocated to each sales volume classification on the basis of the number of stops made by the driver and relief driver.

WHOLESALE TRUCK COSTS

A listing was made covering all vehicles used by Borden's Wisconsin Region in making deliveries at wholesale. This listing showed the vehicle description, vehicle number, date of procurement, original cost, miles travelled, gasoline and oil usage, etc.

The truck data per the Company records was reviewed. Meetings were held with automotive consultants in regard to cost and performance standards covering the vehicles used in making wholesale deliveries. As a result of such reviews, vehicle costs were developed which would provide truck cost data representative of the use made of such vehicles. This approach also considered the fact that with the introduction of the drop delivery program of August 3, 1964, drop delivery route schedules were revised, past truck mileage records were not representative and other costs might not be relative.

The truck costs so developed considered truck life expectancy at 8 years; a standard monthly cost for preventative maintenance was used, gasoline and oil costs were computed on basis of August 1964 usage multiplied by the purchase cost of such materials, tire costs were based on August 1964 mileage related to original tire purchase costs which considered engineering estimates of the mileage potentials. Parts and supplies used were based upon experienced usage for the year 1963 covering a wholesale operation where such costs were available, and provision was made for major overhauls at engineering standards. Truck licenses, taxes and insurance expenses were also included. Where trailers were used in conjunction with tractors, the trailer depreciation, tire costs, body maintenance, licenses and other costs were also included.

The average cost per delivery day developed and used was in excess of truck cost data covering the wholesale trucks operated by the Wisconsin Region's Milwaukee branch by approximately $1,413 per month. This cost was allocated to the sales volume in each discount bracket category over all the stops on an equal basis.

LOADING

The wholesale truck loading function was reviewed and studied by Bordens Wisconsin Region's Milwaukee plant supervisor

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and time and cost data developed in respect thereto. This cost was allocated to the sales volume in each discount bracket category equally on the basis of volume.

HEAT, LIGHT AND POWER

The total cost of this expense classification was obtained from the records of Bordens Wisconsin Region's Milwaukee wholesale branch covering the eight (8) periods ended August 29, 1964. This cost was allocated to the sales volume in each discount bracket category equally on the basis of volume.

ALL OTHER BRANCH COSTS

The total cost of this expense classification was obtained from the records of Bordens Wisconsin Region's Milwaukee wholesale branch covering the eight periods ended August 29, 1964. This expense classification includes such costs as property expense, repairs to machinery and equipment, credit and collection expenses, accounting and clerical expense covering delivery functions and other miscellaneous expense.

The cost was allocated to the sales volume in each discount bracket category over all the stops on an equal basis.

BILLING

The introduction of the August 3, 1964 drop delivery schedule transferred all billing and account receivable record keeping functions to the office. The functions involved and the records maintained are implemented through the use of National Cash Register Co.'s computer and bookkeeping machine equipment.

A study was made of the various functions and elements of expense by Bordens Wisconsin Region's Milwaukee office. This study disclosed the various elements of cost attaching to the various functional activities involved which include checking pre orders, summarizing pre order requisitions, preparing route order tickets, summarizing route delivery tickets, computing the value of sales, preparing weekly invoices, handling collections, maintaining account receivable records, stationery, postage, etc.

This cost was allocated to the sales volume in each discount bracket category based on the number of locations in accordance with the type of billing function performed.

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SELLING, ADVERTISING AND MERCHANDISING EXPENSES

Borden's Wisconsin Region maintains a staff of thirteen (13) wholesale salesmen servicing the wholesale customers and promoting the sale at wholesale of its products. In addition to the selling activities of the salesmen, the General Manager, Branch Manager and Wholesale Sales Supervisisors also devote part of their time to customer service and sales requirements.

The work of such sales personnel involves the presentation of products, product demands and branch acceptability, available merchandising programs, advertising programs, and the orientation of customers as to company's operating policies and practices. They also assist the dealer in the development of sales and merchandising programs related to specific products or the entire product line. Also, with the introduction of private labels fluid milk products, certain selling costs are involved in this area.

Each salesman was requested to examine by customers served during August 1964, the estimated extent of his time devoted to the various activities carried on in the performance of his job responsibilities. A schedule was developed which listed the principal activities such as checking the dairy case, rotation of products, putting up "point of sale" materials, delivery of "point of sale" material, new product promotions, special sales campaigns, selling price announcements, complaints, general selling, collections, parking car, customer relations, general driving, etc. Each salesman then listed the time spent based on his experience with each customer account in respect to the various selling activities which took place.

In addition, estimates were secured from the Wisconsin Region's General Manager, Assistant General Manager, Wholesale Sales Manager, Wholesale Sales Supervisor as well as the various Branch Managers, of the portion of their time devoted to sales and selling activities, further sub-divided as between the Borden label and private label products. Regarding private label products cognizance should be given to the fact that prior to August 3, 1964 Borden's Wisconsin Region did not produce or sell private label fluid milk products.

The wage cost including benefits and other wage items together with the travel expense was developed from the Wisconsin Region's records for the eight (8) periods ended August 29, 1964 and a monthly average determined. The portion of time estimated devoted to ice cream activities was eliminated and the remaining time and expense was allocated to Borden label and private label products on the basis of functional activity and management estimates.

Advertising and merchandising expenditures for the eight (8) periods ended August 29, 1964 were secured from the records of Borden's Wisconsin Region. These expenditures were reviewed as to their inclusion and an average expense per period was determined. The total advertising and merchandising expenditures were applicable to the Borden label, no part of such expenditures having been made covering private label products.

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A&P PROPOSED FINDINGS OF FACT

GENERAL AND ADMINISTRATIVE EXPENSES

This expense is based upon an analysis made covering the year 1963. This expense category includes both local divisional and national general and administrative expense.

The total cost for the year was determined from the Company's records and the portion of such cost applicable to fluid milk operations was computed based on the value of fluid milk sales to the totals of all sales.

The data for the year 1963 instead of more recent and current data was used because the use of interim data does not properly reflect representative costs.

GENERAL

The following exhibits are attached, the data shown on such reports having been developed in accordance with the procedures and methods outlined above.

Exhibit I	Costs, By Volume Discount Brackets, On Sales To Wholesale Store Customers Via Drop Delivery Basis For The Week Ended August 22, 1964.
Exhibit II	Selling, Advertising, and Merchandising Expense Allocation, Between Borden and Private Labels, On Wholesale Store Deliveries For The Month Of August 1964.
Exhibit III	Unit Costs, By Products, On Sales To Wholesale Store Customers Via Drop Delivery Basis As Related To Unit Selling Prices In Effect For The Month Of August 1964, as Related to Unit Selling Prices in Effect for the Week Ended August 3, 1964.

Exhibit III "Summary of Unit Costs by Products Delivered etc." discloses, that based on the data shown thereon the net selling prices expressed in terms of the lowest net selling prices after allowances for the maximum discount of 23.6% covering drop deliveries are in excess of all costs with the exception of dry cheese, pounds, which is sold only in very limited quantities.

Exhibit I "Direct and Indirect Drop Delivery Costs For Wholesale Store Customers by Volume Discount Brackets" discloses, that the difference in the cost of delivery expenses reasonably supports the difference in the net selling prices covering drop delivery sales as set forth in the Drop Delivery Store Discount Schedule of August 3, 1964.

Exhibit II "Selling and Advertising Expenses at Wholesale" discloses that the difference established in the net selling price per point of $.005 per the "Wholesale Milk Selling Prices to Stores" and applicable "Drop Delivery Store Discount Schedules is supported by the difference in selling, advertising and merchandising expenses.

C-44-B

The developed costs as set forth in the foregoing outline and as disclosed by the attached exhibits are in my opinion indicative of the cost results obtained and are not only realistic but conservative in treatment. Where any doubt existed as represented in the case of truck costs, the higher cost amount was used. In addition certain overhead cost elements have been included at maximum levels.

The data reported as a part of this affadivit has been developed in my opinion on the basis of sound accounting principles and methods and follow generally accepted cost accounting theory and practice.

/s/ J. F. Malone

J. F. Malone

Subscribed and sworn to
before me this 20th day
of October, 1964.

Notary Public, Dane County

My Commission expires January 14, 1968.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

- x

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC., :

Petitioner, :

v. : AFFIDAVIT OF SERVICE

FEDERAL TRADE COMMISSION, :

Respondent. :

- x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

ROBERT R. CAWTHRA, being duly sworn, deposes and says:

1. I am over the age of 18 years and not a party to this action.

2. On the 8th day of February, 1977, I served 4 volumes of the Joint Appendix and 6 volumes of the Exhibits upon:

Baldwin Ogden, Esq.
Office of General Counsel
Federal Trade Commission Building
Pennsylvania Avenue at 6th Street, N.W.
Washington, D.C. 20580

by depositing a true and correct copy thereof in the United States Post Office at 73 Pine Street, New York, New York enclosed in a stamped, sealed envelope addressed to the above-mentioned attorneys.

Robert R Cawthra

Robert R. Cawthra

Sworn to before me this

8th day of February, 1977.

Notary Public

ROBERT F. BELLUSCIO
Notary Public, State of New York
No. 31-4625331
Qualified in New York County
Commission Expires March 30, 1978

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